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No. 94-560

In the Supreme Court of the United States

OCTOBER TERM, 1994

FIRST OPTIONS OF CHICAGO, INC., PETITIONER,

v.

MANUEL KAPLAN, CAROL KAPLAN & M.K. INVESTMENTS, INC., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-1814

KAPLAN, *et al.* v. FIRST OPTIONS

RELEVANT DOCKET ENTRIES

DATE	DESCRIPTION
1992	
October 5	Civil Case Docketed.
1993	
January 4	Appellants' brief filed.
February 8	Appellee's brief filed.
March 31	Appellants' reply brief filed.
June 23	Case argued and submitted.
1994	
March 31	Opinion filed.
June 15	Appellee's Petition for Rehearing filed.
June 17	Chicago Board of Trade's brief in *amicus curiae* in support of appellee's petition for rehearing filed.
June 29	Appellee's petition for rehearing denied.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 92-MC-210

KAPLAN, *et al.* v. FIRST OPTIONS

RELEVANT DOCKET ENTRIES

DATE	NO.	DESCRIPTION
1992		
June 8	1	MKI's and Kaplans' petition to vacate arbitration award.
June 25	2	First Options' cross motion to confirm arbitration award and enter judgment.
July 10	5	MKI's and Kaplans' motion for an order vacating arbitration award.
August 7	9	First Options' memorandum in opposition to motion for an order vacating arbitration award.
August 14	10	First Options' motion for preliminary injunction.
August 28	12	MKI's and Kaplans' memorandum in opposition to First Options' motion for preliminary injunction.

September 1	13	MKI's and Kaplans' reply brief in support of their motion for an order vacating arbitration award.
September 2	14	Stipulation of certain facts.
September 2	17	Supplemental stipulated finding of facts.
September 25	22	First Options' motion for preliminary injunction denied as moot.
September 25	—	Motion to vacate arbitration award denied.
September 25	23	Judgment entered.
September 30	26	Kaplans' notice of appeal.
November 12	—	Record complete for purposes of appeal.

LETTER AGREEMENT

March 24, 1988

First Options of Chicago, Inc.
440 South LaSalle Street
Chicago, Illinois 60605

Gentlemen:

1. Statement of Indebtedness. MK Investments, Inc. a corporation organized and existing under the laws of Pennsylvania ("MK"), Duck Brothers, Inc. a corporation organized and existing under the laws of Pennsylvania ("Duck"), and Options Investors, Inc., a corporation organized and existing under the laws of New Jersey ("OI") are presently indebted to you in the aggregate amount of $5,176,953, $2,307,498, and $750,235, respectively, as a result of their trading activities with you. MK is also indebted to you in the amount of $300,0000 representing outstanding claims against MK, Duck and OI by the Exchange (hereinafter defined) or any other entities for unpaid invoices and brokerage bills (the "Brokerage Bills"). MK hereby agrees to assume the indebtedness to you of OI and the Brokerage Bills (to the extent actually paid by you) and hereby affirms that it is indebted to you in the aggregate amount of $6,227,188 (the "MK Indebtedness"). Duck hereby affirms that it is indebted to you in the aggregate amount of $2,307,498 (the "Duck Indebtedness"). MK further unconditionally guarantees the full and prompt payment, subject to the terms of this Agreement, of the Duck Indebtedness evidenced by the Duck Note (hereinafter defined) pursuant to a guaranty substantially in the form of Exhibit A hereto (the "Guaranty"). The MK Indebtedness plus the amount of the Duck Indebtedness shall be called the Total Indebtedness (the "Total Indebtedness"). All payments to you or withdrawals by you hereunder shall be applied to the MK Indebtedness and the Duck Indebtedness in an amount equal to the percentage each bears to the Total Indebtedness; provided, however, the $80,000 payment referred to in Section 3, the

proceeds of sale of the four (4) MK Memberships and one-half (1/2) of the proceeds of sale of the Duck Membership (as defined below) referred to in Section 3 and the Manuel Kaplan ("Mr. Kaplan") tax refunds referred to in Section 4 shall be applied to the MK Indebtedness only.

2. Subordination Agreement and Subordinated Note. MK and Duck agree to execute and deliver to you upon your request, in form and substance satisfactory to you, a subordinated loan agreement (the "Subordinated Loan Agreement") and such other documentation as shall be necessary or appropriate for you to make subordinated loans to MK and Duck in the amount of the MK Indebtedness and Duck Indebtedness, as the case may be, less the payments described in Section 3. In connection with such Subordinated Loan Agreement, MK and Duck each agree to execute and deliver to you a promissory note, in form and substance satisfactory to you, executed by MK or Duck, as the case may be, dated the date of such delivery, and payable to you in a principal amount equal to the amount of the MK or Duck Indebtedness, less the payments described in Section 3. (the "MK Subordinated Note" and the "Duck Subordinated Note", collectively the "Subordinated Notes"). The Subordinated Notes shall be payable on March 31, 1998 (unless sooner accelerated), subject to the mandatory payments hereinafter described. The Subordinated Notes may be prepaid at any time; provided, however, any such prepayment shall comply with the prepayment provisions of the Subordinated Notes. The Subordinated Notes shall contain Events of Acceleration (as defined below) as set forth in the Subordinated Loan Agreement, upon the occurrence and continuance of which all amounts under the Subordinated Notes shall or may at your option, be immediately accelerated. The term "Event of Acceleration" shall have the same meaning in this Agreement as in the Subordinated Loan Agreement.

MK, Duck, Mr. Kaplan and Larry Goldberg ("Mr. Goldberg") agree that MK, Duck, Mr. Kaplan and Mr. Goldberg may not resume trading on the Exchange (hereinafter defined), or any other exchange, until (1) the $80,000 payment provided in Section 3 of this Agreement has been made to you, (2) the Memberships

(hereinafter defined) have been sold to you, (3) you have received duly executed Subordinated Notes and the Subordination Agreement and (4) you have received a schedule of all profit sharing arrangements as required pursuant to Section 9.

3. Initial Payments. MK hereby agrees that within four calendar days of the Effective Date (as defined in Section 17) of the Agreement, MK will deliver to you $80,000 in the form of a cashier's check payable to you in such amount issued by such bank as shall be acceptable to you or in such other form as shall be acceptable to you for application by you toward the payment of the MK Indebtedness.

Within four calendar days of the Effective Date of this Agreement, MK and Duck agree to sell and transfer to you and you agree to purchase from MK and Duck, MK's four (4) and Duck's one (1) Philadelphia Stock Exchange (the "Exchange") Regular Memberships with Options Privileges (the "Memberships") at a price equal to each Membership's Fair Market Value on the date appearing on the first page hereof. "Fair Market Value" means, on the date appearing on the first page hereof, the average of the "bid" and "offer" price for memberships similar to such Membership on the Exchange as reasonably determined by you. You shall apply the sale proceeds of the MK and Duck Memberships, free and clear of any other claims or interests therein, to the MK Indebtedness or Duck Indebtedness, as the case may be as herein provided. Upon the sale of a Membership to you, you agree to lease such Membership to MK and Duck, as the case may be, until such time as this Agreement has been terminated or an Event of Acceleration has occurred and shall be continuing, on terms substantially similar to the terms contained in the lease agreement attached hereto as Exhibit B; provided, however, each such lease shall provide for monthly lease payments in an amount equal to the monthly interest payments for a loan in the principal amount of 70.17 percent (70.17%) of the sale price of such Membership with interest thereon at a rate per annum equal to the Reference Rate from time to time in effect plus two percent (2%) per annum. Each lease shall contain an option to repurchase the appropriate Membership at Fair Market Value upon the

termination of this Agreement; provided however each such option to repurchase as well as such lease shall terminate upon an Event of Acceleration. "Reference Rate" at any time shall mean the rate of interest then most recently announced by Continental Illinois National Bank and Trust Company of Chicago at Chicago, Illinois as its reference rate. The rate of interest shall change from time to time, and hence the lease payments on each such lease described herein shall change from time to time, concurrently with changes in the Reference Rate.

4. Tax Refunds. Mr. Kaplan and Mrs. Carol Kaplan ("Mrs. Kaplan"), his wife, shall file (or cause to be filed) all necessary documents to obtain all tax refunds (including but not limited to, income tax refunds and estimated tax payments) which are now, or which may be or become, due or owing to Mr. Kaplan and/or Mrs. Kaplan from the United States Government or any state or local government. Mr. Kaplan and Mrs. Kaplan will file (or cause to be filed) 1987 federal and state tax returns by June 15, 1988 and promptly deliver copies thereof to you. If Mr. Kaplan does not file federal and state tax refund requests for prior years by October 15, 1988, Mr. Kaplan shall obtain and deliver to you a statement of his accountant that the amount of federal and state tax refunds for prior years does not exceed $150,000. Upon receipt of any and all tax refunds, Mr. Kaplan and Mrs. Kaplan agree to immediately remit the amount of such refunds to you which shall be applied by you to the prepayment of the Total Indebtedness. In the event you shall not have received the full amount of any and all 1987 tax refunds which shall be in an amount of at least $300,000 by February 28, 1989, you may deem such non-payment on February 28, 1989 to constitute an Event of Acceleration; provided, however, such non-payment shall not constitute an Event of Acceleration if it is the result of delays of the applicable tax authority but in any event shall constitute an Event of Acceleration on March 31, 1989.

5. Trading Account and Work Out Program. Within four calendar days of the Effective Date of this Agreement, MK will deposit in a trading account with you (the "Trading Account") immediately available funds in the amount of $900,000, which

shall include MK's entire one-third interest in the profits of DKW currently in account no. 666. MK represents and warrants that such DKW funds are free and clear of all claims or interests therein. Five hundred thousand dollars ($500,000) of such deposit shall be called the MK Allocation (the "MK Allocation"). Four hundred thousand dollars ($400,000) of such deposit shall be called the FOC Allocation (the "FOC Allocation"). To the extent the MK Allocation consists of funds MK or Mr. Kaplan borrowed from any natural or legal person other than Mr. Kaplan or Mrs. Kaplan, such borrowed funds shall be regarded as Senior Liabilities for purposes of the Subordinated Notes. If the MK Allocation consists of funds of Mr. or Mrs. Kaplan, such borrowed funds shall not represent Senior Liabilities for purposes of the Subordinated Notes. The Senior Liabilities shall at all times remain the property of MK and may not be withdrawn by you.

Except as otherwise provided herein, neither MK nor you shall make any withdrawals from the Trading Account and withdrawals shall not reduce the net liquidating balance in the Trading Account below $900,000. Until this Agreement is terminated as provided in Section 7 or an Event of Acceleration shall occur and be continuing, MK and you agree that MK may withdraw from time to time in the aggregate the first $10,000 in Net Trading Profits (as defined below) credited to the Trading Account during any calendar month commencing with the calendar month in which $900,000 is deposited into the Trading Account until such calendar month in which the Agreement is terminated if the MK Allocation is not reduced below $500,000. If MK withdraws such amounts, then you may from time to time withdraw in the aggregate the second $10,000 Net Trading Profits credited to the Trading Account during such calendar month if the FOC Allocation is not reduced below $400,000. MK's rights to withdraw the amounts contemplated herein shall be suspended if any withdrawal would reduce the MK Allocation below $500,000. Such right shall be suspended until such time as the MK Allocation has been restored to $500,000. If MK or you choose not to withdraw such amounts during any calendar month, then the FOC Allocation and the MK Allocation as the case may be, shall be increased in the amount of the foregone withdrawal. If MK or you withdraw such amounts,

it shall reduce the MK Allocation or the FOC Allocation, as the case may be, in the amount of such withdrawal. Any withdrawals by you or MK pursuant to this paragraph shall be included in your respective shares of Net Trading Profits and the withdrawals limits as hereinafter provided. If you withdraw such amounts, you shall apply it to the Total Indebtedness. The term "Net Trading Profits (Losses)" shall mean Gross Trading Revenues minus Operating Expenses. "Gross Trading Revenues" means the sum of realized and unrealized gains and losses from positions traded on any exchange for the time period during which Gross Trading Revenues are being determined plus trading related income, including, without limitation, dividends, cash tenders of stock, short stock rebates plus MK's or Mr. Kaplan's share of all net trading profits from all other profit-sharing arrangements as defined in Section 9. "Operating Expenses" shall mean the following expenses incurred by MK in the operation of its trading business: reasonable compensation to employees and traders, supplies, interest payments on the Senior Liabilities (as hereinafter defined), interest payments on indebtedness permitted by Section 7 of the Subordinated Loan Agreement, interest payments on the FOC Allocation capital and debit balance interest charges, brokerage commissions, exchange dues, regulatory expenses, reasonable medical and term life insurance for Mr. Kaplan and clerical employees of MK, with cash benefits not to exceed $2,000,000 in the case of Mr. Kaplan or $50,000 in the case of clerical employees of MK (in neither case shall it be required that you be a beneficiary of such policies) lease fees, office rent, telephone, postage, quotation machines, reasonable attorneys' and accountants' fees and taxes but excluding any compensation, entertainment expenses, commissions, benefits or other distributions to Mr. Kaplan. "Taxes" for purposes of calculating Operating Expenses shall include all taxes payable by MK as well as taxes of Mr. and Mrs. Kaplan relating to Mr. Kaplan's share of income generated by MK and Duck which flows through to Mr. Kaplan to the extent that tax loss carry forward credits are not available.

Notwithstanding the preceding paragraph, MK may withdraw in the aggregate $10,000 from the Trading Account during each of the first six months of this Agreement regardless of the amount of

the Net Trading Profits therein or if such withdrawals reduce the MK Allocation in the Trading Account below $500,000; provided however if the MK Allocation is not restored to $500,000 at the end of such six month period, no further monthly withdrawals pursuant to this paragraph or the preceding paragraph shall be permitted until the MK Allocation is restored to $500,000. MK may also withdraw from time to time amounts equal to the amount of interest due on that portion of the initial MK Allocation $500,000 which constitute Senior Liabilities (the "Senior Liabilities") for purposes of the Subordinated Notes; provided, however, the Senior Liabilities may not bear interest at a rate per annum greater than the rate of the Reference Rate per annum plus two percent (2%) per annum. In addition, you recognize the provisions of the trading agreements entered into by MK as of the date hereof with Edward Sneiderman, Eric Bryant, Sherman Frager, Nick DeCicco and Michael Garner and the agreement between Duck and Jules Meisel, and you agree to permit withdrawals to such parties in accordance with the terms of such agreements.

Moreover, at the end of each year (or portion thereof) during the First Payment Stage (as defined below) commencing on December 31, 1988 and continuing until such First Payment Stage is completed, and to the extent that Net Trading Profits credited to the Trading Account during such year (or portion thereof) do not in the aggregate exceed the Base Amount (as defined below), then MK and you shall share all the Net Trading Profits equally. To the extent that the aggregate Net Trading Profits credited to the Trading Account during such year (or portion thereof) exceed the Base Amount (as defined below), then you and MK shall be entitled to 75% and 25%, respectively, of the Net Trading Profits credited to the Trading Account over the Base Amount.

All Net Trading Losses during the First Payment Stage (as defined below) or the Second Payment Stage (as defined below) shall be shared equally and shall reduce the FOC Allocation and MK Allocation accordingly; provided, however, you shall not share in any Net Trading or Losses at any time after which the FOC Allocation has been reduced to zero.

If you or MK choose not to withdraw your respective shares of the Net Trading Profits at the end of such year (or portions thereof) during the First Payment Stage (as defined below), then the MK Allocation or the FOC Allocation, as the case may be, shall be increased in the amount of MK's or your share of Net Trading Profits. If you choose to withdraw any share of your Net Trading Profits at the end of such year (or portion thereof) or any time thereafter whether during or after the Second Payment Stage, then you shall immediately apply such amount to the Total Indebtedness; provided, however, you may not withdraw more than 50% of your share of the Net Trading Profits at the end of any year (or portion thereof) during the First Payment Stage and the amounts required to be retained in the Trading Account shall increase the Base Amount (as defined below). If you plan to withdraw such amounts at the end of such year (or portion thereof) or at any time thereafter whether during the First or Second Payment Stage, you shall give MK thirty (30) days prior written notice of such choice; provided, however, such notice is not required if MK has withdrawn its share of the Net Trading Profits first in time. If MK chooses to withdraw any share of its Net Trading Profits, then the MK Allocation shall not be increased by the amount withdrawn; provided however, MK may not withdraw more than 50% of its share of Net Trading Profits at the end of such year (or a portion thereof) and the amounts required to be retained in the Trading Account shall increase the Base Amount (as defined below). The Base Amount (as defined below) may not be withdrawn during the First Payment Stage except as otherwise provided in Sections 5, 7 and 10. As used herein, the term "First Payment Stage" shall mean the period of time commencing on the date of this Agreement and continuing until such time as the outstanding principal balance of the Subordinated Notes minus the amount of the FOC Allocation equals $4,267,343. The term "Base Amount" shall mean, during the first year (or portion thereof) of the First Payment Stage, $900,000, and during any subsequent year (or portion thereof) during the First Payment Stage $900,000 plus the amount by which each of the FOC Allocation and MK Allocation have been increased by their portion

of Net Trading Profits which are required to be retained in the Trading Account as provided in this Section 5 of the Agreement.

If the First Payment Stage does not end on or before February 28, 1995 and such delay is the result of the serious illness or physical incapacitation of Mr. Kaplan as defined in Section 10, or the closing of the Exchange, the suspension of options trading or similar event, then you may withdraw the FOC Allocation and MK may withdraw the MK Allocation after liquidating the Trading Account and this Agreement shall terminate as provided in Section 7. If the events described in the preceding sentence are not the cause of such delay, then you may deem an Event of Acceleration to have occurred whereupon you may withdraw the FOC Allocation and so much of the MK Allocation (less Senior Liabilities) until the outstanding principal balance of the Subordinated Notes minus the FOC Allocation equals $4,267,343 and the Agreement shall terminate as provided in Section 7. Notwithstanding Section 6(b), the Subordinated Notes shall not be deemed to have borne interest upon the occurrence of the Event of Acceleration described in the preceding sentence.

At the end of each year (or portion thereof) during the Second Payment Stage (as defined below) until such Second Payment Stage is completed, you may withdraw up to 25% of the Net Trading Profits credited to the Trading Account during such year (or portion thereof); provided, however, at the beginning of each year (or portion thereof) during the Second Payment Stage, MK shall elect whether it shall (i) pay to you $2,150,000 or if any amounts have already been paid to you out of MK withdrawals during the Second Payment Stage, or credited to the FOC Allocation or any combination thereof, MK shall pay to you an amount which when added to such amounts already paid or credited to you during the Second Payment Stage shall equal $2,150,000 or (2) continue to share Net Trading Profits with you as provided in this sentence for that year (or portion thereof); provided, further, if at the end of the Second Payment Stage, you shall not have received $2,150,000, or if the FOC Allocation has not been credited by an amount equal to $2,150,000 or you shall not have received $2,150,000 through any combination thereof, then you may

continue to share Net Trading Profits as provided in this sentence until such time as the FOC Allocation has been increased to $2,150,000, or an amount up to $2,150,000 has been paid to you or you shall have received $2,150,000 through any combination thereof. You may withdraw any part of your 25% share of the Net Trading Profits credited to the Trading Account at the end of each year (or portion thereof) during the Second Payment Stage or at anytime after such year upon giving (thirty) 30 days prior written notice of the date of such withdrawal to MK; provided however, such notice is not required if MK has withdrawn its share of Net Trading Profits first in time. MK may withdraw any part of its 75% share of Net Trading Profits credited to the Trading Account at the end of each year (or portion thereof) during the Second Payment Stage. You may choose not to withdraw your percentage share of Net Trading Profits credited to the Trading Account during the Second Payment Period. In such case, the FOC Allocation shall be increased by the amount of your percentage share of the Net Trading Profits.

The term "Second Payment Stage" shall mean the period commencing on the date the outstanding principal balance of the Subordinated Notes minus the FOC Allocation equals $4,267,343 and ending on the third anniversary date thereof.

If at any time during the Second Payment Stage Net Trading Losses result in the outstanding principal balance of the Subordinated Notes minus the FOC Allocation being greater than $4,267,343, then you and MK shall deem the Second Payment Stage not to have occurred and you and MK shall have the rights and obligations specified during the First Payment Stage until such time as the outstanding principal balance of the Subordinated Notes minus the FOC Allocation again equals $4,267,343, whereupon the Second Payment Stage shall begin.

If at any time during the Second Payment Period only, MK and Mr. Kaplan want to stop trading completely and Mr. Kaplan wants to retire from trading and no longer be actively associated with a broker-dealer in a trading capacity or be an employee thereof in a trading capacity ("Retirement"), then MK shall pay you your share of all amounts earned until the date of Retirement

as provided herein during the Second Payment Stage which shall be applied to the Total Indebtedness and the Agreement shall terminate as provided in Section 7; provided, however, if MK and/or Mr. Kaplan should become actively associated with a broker dealer in a trading capacity or be an employee thereof in a trading capacity within five (5) years of the date of Retirement, then (1) the releases provided in the first paragraph of Section 11 hereof shall be deemed to have never been given; (2) this Agreement shall again be effective and any payment periods provided herein shall be extended by the time equal to the duration of MK's and Mr. Kaplan's absence from trading except that you shall not be required to restore the FOC Allocation; and (3) you shall have all remedies available to you under applicable law.

If after giving thirty (30) days notice of a planned withdrawal as provided herein you are not able to make such withdrawals as a result of the prepayment restrictions contained in Section 5 of the Subordinated Loan Agreement, then no further notice is required and you may make such withdrawals as soon as such withdrawal could be made in compliance with Section 5 of the Subordinated Loan Agreement.

6. (a) Interest Before Event of Acceleration. The FOC Allocation as of the date the Second Payment Stage begins minus $400,000 (or such reduced amount of the FOC Allocation after any withdrawals thereof during the Second Payment Stage) shall bear interest from the date of the Second Payment Stage until the Agreement is terminated at a rate per annum equal to the Reference Rate from time to time in effect plus 2% per annum, payable on the last day of each year (or portion thereof) during the Second Payment Stage and at the termination of this Agreement. Any increases in the FOC Allocation during the Second Payment Stage shall bear interest at the rate specified in the preceding sentence from the date such increase is ascertained until this Agreement is terminated and shall be payable on the last day of each year (or portion thereof) during the Second Payment Stage and at the termination of this Agreement. If any of the leases described in Section 3 hereof have been terminated, then the amount of the FOC Allocation bearing interest during the Second Payment Stage

as provided in this Section 6(a) shall be automatically increased in the amount of _____ percent (%) of the Fair Market Value of the Membership with respect to which the lease was terminated as provided in Section 3. Any interest payable on the FOC Allocation shall be an expense in calculating Net Trading Profits (Losses). MK hereby irrevocably authorizes you to debit the Trading Account in the amount of any interest payments due on the FOC Allocation. If the Trading Account does not have sufficient balances to make the applicable interest payments provided herein, you may deem an Event of Acceleration for non-payment of interest to have occurred and be continuing.

(b) Interest After Event of Acceleration. If an Event of Acceleration shall have occurred, then the Subordinated Notes shall be deemed to have borne interest from the date of the Subordinated Notes at a rate per annum equal to the Reference Rate payable on demand. Any interest required to be paid on the Subordinated Notes shall be reduced by any interest amounts already paid by MK on the FOC Allocation during the Second Payment Stage, as provided in Section 6(a), and the amounts paid as rent in connection with MK's or Duck's lease of the Memberships as provided in Section 3. If an Event of Acceleration shall have occurred and be continuing, the FOC Allocation (as limited herein) and/or the outstanding principal balance of the Subordinated Notes shall continue to bear interest at the rate per annum specified in Section 6a).

7. Termination. If no Event of Acceleration has occurred and is continuing and (i) the outstanding principal balance of the Subordinated Notes after deeming that the FOC Allocation has been applied thereto at most equals $2,117,343,; or (2) Mr. Kaplan and MK have retired from trading during the Second Payment Stage as provided in Section 5; or (3) Mr. Kaplan has died during the Second Payment Stage; or (4) the Agreement is terminated on March 31, 1995 as provided in Section 5; or (5) Mr. Kaplan is seriously ill or physically incapacitated as provided in Section 10; then you may withdraw from the Trading Account the amount of the FOC Allocation notwithstanding Section 5. Upon such withdrawal, this Agreement, the Subordinated Notes and any

other documents referred to herein shall terminate, except that the provisions of Section 9 shall not terminate if this Agreement is otherwise terminated because of Mr. Kaplan's serious illness or physical incapacitation. You shall also deliver to each of MK and Duck a release from their obligations to you under the Subordinated Notes and other documents provided herein as provided in Section 11, whereupon MK and Duck shall have no further liability to you with respect to the obligations originally subject to this Agreement, the Subordinated Notes and any other documents referred to herein.

In the event any payments provided for herein are not made when due or if the Subordinated Notes are accelerated, then you may apply payments received by you, the FOC Allocation and the MK Allocation (less Senior Liabilities) to the Total Indebtedness and the outstanding principal balance thereof shall remain due and owing.

8. Clearing Arrangements. To the extent permitted by applicable law, Mr. Kaplan, Mr. Goldberg, Duck and MK agree neither to open nor maintain, directly or indirectly, whether by, through or in the name of, including without limitation, MK, Duck, OI, Mr. Kaplan or Mr. Goldberg or any other person, corporation, partnership, limited partnership, general partnership, nominee, agent, spouse or other entity, any trading account at any clearing firm, broker-dealer or other entity or at First Options of Chicago, Inc. other than the Trading Account or Duck trading account and they further agree not make or to continue arrangements with any other entity to execute and clear trades nor to self-execute and self-clear trades, without prior written consent from First Options of Chicago, Inc. until such time as the Total Indebtedness and Subordinated Notes are satisfied or released by you; provided, however, Mr. Kaplan and Mr. Goldberg need not obtain prior written consent from you when opening personal investment accounts or KEOGH accounts.

You agree that all clearing fees, commissions and other charges to be paid by MK to you in connection with the Trading Account or other services performed by you for MK shall be competitive with those of other clearing firms performing similar

services for customers similarly situated and which desire to continue to serve such a customer. In the event MK disputes the competitiveness of such fees, MK and you may select one arbitrator each and such arbitrators shall unanimously decide what fees are competitive and such unanimous decision shall be binding on the parties. If such arbitrators are unable to agree, they shall select a third arbitrator within thirty days and their majority decision shall be binding on the parties.

9. Other Profit-Sharing Arrangements. Under the terms of this Agreement, MK is required to make payments to you from any Net Trading Profits earned by MK and credited to the Trading Account. Such "Net Trading Profits" shall include MK's or Mr. Kaplan's share of any net trading profits credited to the Trading Account at First Options of Chicago, Inc. or any other trading account with First Options of Chicago, Inc. or at any other entity of any person, corporation, partnership, limited partnership, general partnership, nominee, agent, spouse or other entity (including MK's share of Duck) directly or indirectly owned, or controlled by MK and Mr. Kaplan and MK and Mr. Kaplan agree to remit or cause such entity to remit to First Options of Chicago, Inc. such net trading profits in excess of the amount of Net Trading Profits which could have been withdrawn by MK pursuant to the provisions of Section 5. Such remitted net trading profits shall be allocated to the FOC Allocation or the MK Allocation as contemplated by Section 5. If such Net Trading Profits are not remitted to the Trading Account directly or your share is not paid directly to you as provided in this Section 9, then you may deem the failure of such remittance to be an Event of Acceleration for non-payment to be continuing.

MK and Mr. Kaplan agree to disclose in writing and deliver any documents evidencing any profit sharing arrangements with any other natural or legal person. MK and Mr. Kaplan represent and warrant that such disclosed profit sharing arrangements constitute all such arrangements and that MK and Mr. Kaplan shall disclose any additional profit sharing arrangements entered into in the future. A breach of the representations and

warranties contained in this Section 9 shall constitute an Event of Acceleration.

10. Illness or Death. If at anytime Mr. Kaplan is unable to trade on the Exchange because of serious illness (including without limitation, blindness, heart attack, stroke, cancer A.I.D.S. or similar illness) or physical incapacitation for a continuous period of six months, as evidenced by the written opinion of two medical doctors selected as herein provided, Mr. Kaplan or his estate may withdraw the MK Allocation from the Trading Account on such date. Upon such withdrawal, you may also withdraw the FOC Allocation. These withdrawals shall be made notwithstanding Section 5. Any profit sharing arrangements which MK or Mr. Kaplan has with any other entity disclosed pursuant to Section 9 hereunder shall continue to be remitted to the Trading Account until the Maturity Date of the Subordinated Notes, or until this Agreement is terminated if Mr. Kaplan shall stop trading because of serious illness or physical incapacitation only. If Mr. Kaplan should resume trading at any time after stopping trading because of serious illness or physical incapacitation as provided herein, then (1) this Agreement shall again become effective and any payment periods provided herein shall be extended by an amount equal to the duration of Mr. Kaplan's absence from trading, except that you shall not be required to restore the FOC Allocation; (2) the releases provided in the first paragraph of Section 11 shall be deemed to have never been given; and (3) you shall have all remedies available to you under applicable law. If Mr. Kaplan dies at any time during the Second Payment Stage this Agreement shall terminate as provided in Section 7.

You and MK shall have the right to select one doctor each for the purposes of the opinion required herein. If such two doctors cannot agree on an opinion of the capacity of Mr. Kaplan to trade on the Exchange, then such doctors shall select a third doctor within 5 days and the majority opinion shall prevail. If Mr. Kaplan dies during the Second Payment Stage, his executor shall select a trader reasonably acceptable to you within 30 days to liquidate the Trading Account, provided, however, until such time as such trader is selected, you shall have the right to liquidate

positions in the Trading Account to keep the Trading Account in compliance with your risk guidelines applicable to such accounts.

11. Releases. Upon termination of this Agreement, the release of or payment in full of the Subordinated Notes and other valuable consideration, receipt and sufficiency of which is hereby acknowledged, you and your subsidiaries do hereby forever release, discharge, waive and forgive all manner of actions, causes, causes of action, suits, accounts, reckonings, controversies, damages, claims, demands, costs, expenses and other liabilities of any kind whatsoever, in law or in equity, which you or your subsidiaries may now have, or which you or your subsidiaries ever had, or which their respective successors or assigns, hereafter ever shall or may have against MK and Duck, and their respective successors, and assigns, for, upon or by reason of any activities relating to the Total Indebtedness, including the payment thereof, in the following accounts: 420; 356; 468; 673; 551; 557; 956; 667; 336; MKB; 398; 428; 350; 388; 434; XIB; and 445 on or at any time prior to the date of the signing of this Agreement.

In consideration of your accepting the Subordinated Notes, the sufficiency of which is hereby acknowledged, MK, Mr. Kaplan, Duck, Mr. Goldberg, OI, Mrs. Kaplan, Ed Manfield, Binary Traders, Isabelle Benton and their respective successors, assigns, heirs and legal representatives (collectively the "MK parties") do hereby forever release, discharge, waive and forgive all actions, causes of action, suits, accounts, reckonings, controversies, damages, claims, demands, costs, expenses and other liabilities whatsoever, in law or in equity, however arising, which the MK parties may now have, may have ever had, or which the MK parties ever may have against you and your subsidiaries or your parent and subsidiary corporations and their respective agents, officers, directors and employees and their respective successors, assigns, heirs or legal representatives upon or by reason of any activities relating to the Total Indebtedness, including the payment thereof, in the following accounts 420; 356; 468; 673; 551; 557; 956; 667; 336; MKB; 398; 428; 350; 388; 434; XIB; and 445 on or at any time prior to the date of signing this Agreement; provided however, with respect to your agents, officers, directors

and employees or any of your subsidiaries, parent and subsidiary corporations or their respective successors, assigns, heirs and legal representatives, such release shall only apply to matters arising under or in connection with transactions with you.

You and your subsidiaries do hereby forever release, discharge, waive and forgive all actions, causes, of action, suits, accounts, reckonings, controversies, damages, claims, demands, costs, expenses and other liabilities of any kind whatsoever, in law or in equity, which you or your subsidiaries may now have, or which you or your subsidiaries ever had, or which their respective successors or assigns, hereafter ever may have against Mr. Kaplan, Larry Goldberg, Ed Manfield, Binary Traders, Isabelle Benton and OI and their respective successors, and assigns, for, upon or by reason of any activities relating to the Total Indebtedness, including the payment thereof, in the following accounts: 420; 356; 468; 673; 551; 557; 956; 667; 336; MKB; 398; 428; 350; 388; 434; XIB; and 445 on or at any time prior to the date of the signing of this Agreement; provided, however, you and your subsidiaries do not release Mr. Kaplan or Larry Goldberg from complete performance of the terms of this Agreement and other documents contained herein and applicable to them.

12. Successors and Assigns. This Agreement shall be binding upon the successors and assigns of MK, Duck, Mr. Goldberg, Mr. Kaplan and First Options of Chicago, Inc.; and, all references herein to MK, Duck and First Options of Chicago, Inc. shall be deemed to include any successor or successors, whether immediate or remote, to such corporations. Mrs. Kaplan is signing this agreement to evidence her agreement to sign all documents necessary to fulfill the terms of this agreement applicable to her. Binary Trading, Ed Manfield and Isabelle Benton are signing this Agreement for purposes of the release contained in Section 11 of this Agreement only.

13. Guaranties. For value received, the sufficiency of which is hereby acknowledged, Mr. Kaplan in his individual capacity does personally and unconditionally agree to fully and promptly perform at all times those aspects of this Agreement (such as Sections 3 and 4) which are specifically required by him to be

performed and which are within his control and to use his best efforts to cause to be performed promptly by MK those aspects of this Agreement, the Subordinated Notes, the Guaranty or any other documents referred to herein required by MK to be performed, provided, however, this performance guaranty of certain actions is not a guaranty of the payment of the Indebtedness of MK, Duck or OI.

14. John Maeder. Concurrently with the execution of this document, there shall be executed a settlement agreement between you, BTD, Inc. and John Maeder which shall provide among other things, that upon the signing of such agreement you shall release BTD, Inc. from its guaranty of the obligations of MK and that you shall release MK from its guaranty of BTD, Inc.

15. Books and Records. You shall establish and maintain the Trading Account and any other account and monitor the books and records concerning the Trading Account or any other account or for any other service contemplated in this Agreement. You shall approve (not to be unreasonably withheld) all distributions, credits or withdrawals or any other matters concerning the Trading Account, any Duck accounts or any other accounts maintained at First Options of Chicago, Inc., by the parties hereto.

MK shall make available during normal business hours for inspection by FOC or its duly authorized representatives any of its books and records of the trading business when reasonably requested by FOC to do so, and furnish FOC any information reasonably requested regarding the trading business within a reasonable time after FOC gives notice of its request therefor. MK shall permit, during normal business hours, representatives of FOC to audit the books and records of the trading business; provided, however, that FOC shall bear the cost and expense of any audit.

16. Law. This Agreement shall be governed by the laws of the State of Illinois.

17. Effective Date. This Agreement, the Subordinated Notes, the Subordinated Loan Agreement, the Guaranty and all other documents referred to herein shall become effective on the

date that you shall notify the parties hereto that you have received telephone or other approval of an outline of the terms of this Agreement from the Office of the Comptroller of the Currency or other appropriate regulatory agencies, provided however such approval shall be obtained within fourteen (14) calendar days of the execution of this Agreement.

Very truly yours,

MK INVESTMENTS, INC.

By: Manuel Kaplan [sig.]

Title: President

Manuel Kaplan [sig.]
Manuel Kaplan, in his individual capacity

[Notarized]

Carol Kaplan [sig.]
Carol Kaplan, in her individual capacity

DUCK BROTHERS, INC.

By: Larry Goldberg [sig.]

Title: President

Larry Goldberg [sig.]
Larry Goldberg, in his individual capacity

OPTIONS INVESTORS, INC.

By: I. Isabelle Benton [sig.]

Title: President

BINARY TRADERS

By: Edward A. Manfield [sig.]

Title: General Partner

Edward A. Manfield [sig.]
Ed Manfield, in his individual capacity

Isabelle Benton [sig.]
Isabelle Benton, in her individual capacity

Accepted this 24th day of March 1988.

FIRST OPTIONS OF CHICAGO, INC.

By: [sig.]

Title: V.P.

EXHIBIT A

GUARANTY

FOR VALUE RECEIVED and in consideration of any subordinated, loan or other financial accommodation heretofore or hereafter at any time made or granted to DUCK BROTHERS, INC., a corporation organized and existing under the laws of Pennsylvania (hereinafter called the "Debtor") by FIRST OPTIONS OF CHICAGO, INC. (hereinafter, together with its successors and assigns, called "FOC"), the undersigned hereby unconditionally guarantees the full and prompt payment when due, whether by acceleration or otherwise, and at all times thereafter, of that certain Subordinated Note dated March 24, 1988 (the "Subordinated Note") of the Debtor payable to FOC in the original principal amount of $2,307,498 subject to the terms of that certain Letter Agreement dated March 24, 1988 (the "Letter Agreement") between the undersigned, the Debtor the other signatories thereto and FOC (all such obligations being hereinafter collectively called the "Liabilities"), and the undersigned further agrees to pay all expenses (including attorneys' fees and legal expenses) paid or incurred by FOC in endeavoring to collect the Liabilities, or any part thereof, and in enforcing this guaranty. The right of recovery against the undersigned under this guaranty is, however, limited to the amount of TWO MILLION THREE HUNDRED SEVEN THOUSAND FOUR HUNDRED NINETY EIGHT AND NO/100 DOLLARS ($2,307,498) plus interest on such amount and all expenses of enforcing this guaranty. The limitation of the amount of FOC's right of recovery against the undersigned for the Liabilities of the Debtor as provided herein shall in no manner adversely affect, limit or otherwise impair FOC's right of recovery under any other guaranty of the Debtor's Liabilities given in favor of FOC by any other party.

The undersigned agrees that, in the event of the dissolution or insolvency of the Debtor or the undersigned, or the inability of the Debtor or the undersigned to pay debts as they mature, or an assignment by the Debtor or the undersigned for the benefit of creditors, or the institution of any proceeding by or against the

Debtor or the undersigned alleging that the Debtor or the undersigned is insolvent or unable to pay debts as they mature, and if such event shall occur at a time when any of the Liabilities may not then be due and payable, the undersigned will pay to FOC forthwith the full amount which would be payable hereunder by the undersigned if all Liabilities were then due and payable.

To secure all obligations of the undersigned hereunder and subject to the terms of the Letter Agreement, FOC shall have a lien upon and security interest in (and may, without demand or notice of any kind, at any time and from time to time when any amount shall be due and payable by the undersigned hereunder, appropriate and apply toward the payment of such amount, in such order of application as FOC may elect) any and all balances, credits, deposits (general or special, time or demand, provisional or final), accounts or moneys of or in the name of the undersigned now or hereafter with FOC and any and all property of every kind or description of or in the name of the undersigned now or hereafter, for any reason or purpose whatsoever, in the possession or control of, or in transit to, FOC or any agent or bailee for FOC, except for the MK Allocation.

This guaranty shall in all respects be a continuing, absolute and unconditional guaranty, and shall remain in full force and effect (notwithstanding, without limitation, the dissolution of the undersigned) until such time as the Subordinated Notes (as defined in the Letter Agreement) have been paid in full or the Letter Agreement is terminated as provided therein.

The undersigned further agrees that, if at any time all or any part of any payment theretofore applied by FOC to any of the Liabilities is or must be rescinded or returned by FOC for any reason whatsoever (including, without limitation, the insolvency, bankruptcy or reorganization of the Debtor), such Liabilities shall, for the purposes of this guaranty, to the extent that such payment is or must be rescinded or returned, be deemed to have continued in existence, notwithstanding such application by FOC, and this guaranty shall continue to be effective or be reinstated, as the case may be, as to such Liabilities, all as though such application by FOC had not been made.

Subject to the terms of the Letter Agreement, FOC may, from time to time, whether before or after any discontinuance of this guaranty, at its sole discretion and without notice to the undersigned, take any or all of the following actions: (a) retain or obtain a security interest in any property to secure any of the Liabilities or any obligation hereunder, (b) retain or obtain the primary or secondary obligation of any obligor or obligors, in addition to the undersigned, with respect to any of the Liabilities, (c) extend or renew for one or more periods (whether or not longer than the original period), alter or exchange any of the Liabilities, or release or comprise any obligation of the undersigned hereunder or any obligation of any nature of any other obligor with respect to any of the Liabilities, (d) release its security interest in, or surrender, release or permit any substitution or exchange for, all or any part of any property securing any of the Liabilities or any obligation hereunder, or extend or renew for one or more periods (whether or not longer than the original period) or release, compromise, alter or exchange any obligations of any nature of any obligor with respect to any such property, and (e) resort to the undersigned for payment of any of the Liabilities, whether or not FOC (i) shall have resorted to any property securing any of the Liabilities or any obligation hereunder or (ii) shall have proceeded against any other obligor primarily or secondarily obligated with respect to any of the Liabilities (all of the actions referred to in preceding clauses (i) and (ii) being hereby expressly waived by the undersigned).

Any amounts received by FOC from whatsoever source on account of the Liabilities may be applied by it toward the payment of such of the Liabilities, and in such order of application, as FOC may from time to time elect, subject to the terms of the Letter Agreement.

Until such time as this guaranty shall have been discontinued as to the undersigned and FOC shall have received payment of the full amount of all Liabilities and of all obligations of the undersigned hereunder or until the Letter Agreement is terminated, no payment made by or for the account of the undersigned pursuant to this guaranty shall entitle the undersigned by subrogation or

otherwise to any payment by the Debtor or from or out of any property of the Debtor and the undersigned shall not exercise any right or remedy against the Debtor or any property of the Debtor by reason of any performance by the undersigned of this guaranty.

Subject to the terms of the Letter Agreement, the undersigned hereby expressly waives: (a) notice of the acceptance by FOC of this guaranty, (b) notice of the existence or creation or non-payment of all or any of the Liabilities, (c) presentment, demand, notice of dishonor, protest, and all other notices whatsoever, and (d) all diligence in collection or protection of or realization upon the Liabilities or any part thereof, any obligation hereunder, or any security for, or guaranty of, any of the foregoing.

The creation or existence from time to time of Liabilities in excess of the amount to which the right of recovery under this guaranty is limited is hereby authorized, without notice to the undersigned and shall in no way affect or impair the rights of FOC and the obligations of the undersigned under this guaranty.

Subject to the terms of the Letter Agreement, FOC may, from time to time, whether before or after any discontinuance of this guaranty, without notice to the undersigned, assign or transfer any or all of the Liabilities or any interest therein; and, notwithstanding any such assignment or transfer or any subsequent assignment or transfer thereof, such Liabilities shall be and remain Liabilities for the purposes of this guaranty, and each and every immediate and successive assignee or transferee of any of the Liabilities or of any interest therein shall, to the extent of the interest of such assignee or transferee in the Liabilities, be entitled to the benefits of this guaranty to the same extent as if such assignee or transferee were FOC; provided, however, that, unless FOC shall otherwise consent in writing, FOC shall have an unimpaired right, prior and superior to that of any such assignee or transferee, to enforce this guaranty, for the benefit of FOC, as to those of the Liabilities which FOC has not assigned or transferred.

The undersigned hereby warrants to FOC that the undersigned now has, and will continue to have independent means of obtaining information concerning the affairs, financial condition and business

of the Debtor. FOC shall not have any duty or responsibility to provide the undersigned with any credit or other information concerning the affairs, financial condition or business of the Debtor which may come into FOC's possession.

No delay on the part of FOC in the exercise of any right or remedy shall operate as a waiver thereof, and no single or partial exercise by FOC of any right or remedy shall preclude other or further exercise thereof or the exercise of any other right or remedy; nor shall any modification or waiver of any of the provisions of this guaranty be binding upon FOC except as expressly set forth in a writing duly signed and delivered on behalf of FOC. No action of FOC permitted hereunder shall in any way affect or impair the rights of FOC and the obligations of the undersigned under this guaranty. For the purposes of this guaranty, Liabilities shall include all obligations of the Debtor to FOC, notwithstanding any right or power of the Debtor or anyone else to assert any claim or defense as to the invalidity or unenforceability of any such obligation, and no such claim or defense shall affect or impair the obligations of the undersigned hereunder. The obligations of the undersigned under this guaranty shall be absolute and unconditional irrespective of any circumstance whatsoever which might constitute a legal or equitable discharge or defense of the undersigned. The undersigned hereby acknowledges that there are no conditions to the effectiveness of this guaranty, except for the signing of the Letter Agreement and the Subordinated Loan Agreement.

This guaranty shall be binding upon the undersigned, and the successors and assigns of the undersigned; and to the extent that the Debtor or the undersigned is either a partnership or a corporation, all references herein to the Debtor and to the undersigned, respectively, shall be deemed to include any successor or successors, whether immediate or remote, to such partnership corporation.

This guaranty has been delivered at Chicago, Illinois, and shall be construed in accordance with and governed by the laws of the State of Illinois. Wherever possible, each provision of this guaranty shall be interpreted in such manner as to be effective and

valid under applicable law, but if any provision of this guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this guaranty.

The undersigned hereby expressly waives any right to a trial by jury in any action or proceeding to enforce or defend any rights (i) under this guaranty or under any amendment, instrument, document or agreement delivered or which may in the future be delivered in connection herewith or (ii) arising from any relationship existing in connection with this guaranty, and agrees that any such action or proceeding shall be tried before a court and not before a jury.

In the event of any conflict between the terms of the guaranty and the Letter Agreement or the Subordinated Loan Agreement the terms of the Letter Agreement or the Subordinated Loan Agreement, as the case may be, shall control in all respects.

SIGNED AND DELIVERED this 24th day of March, 1988.

MK INVESTMENTS, INC.

By: Manuel Kaplan [sig.]

Title: President

[Notarized]

SUBORDINATED LOAN AGREEMENT

This Agreement is made this 24th day of March, 1988 between First Options of Chicago, Inc., a Delaware corporation ("FOC"), MK Investments, Inc., a Pennsylvania corporation ("MK") and Duck Brothers, Inc., a Pennsylvania corporation ("Duck") (collectively the "Borrowers").

1. Indebtedness. MK is presently indebted to FOC in the aggregate amount of $6,227,188 as a result of its trading activities with FOC (the "MK Indebtedness"). Duck is presently indebted to FOC in the aggregate amount of $2,307,498 as a result of its trading activities with FOC (the "Duck Indebtedness"). The amount of the MK Indebtedness plus the amount of the Duck Indebtedness shall equal a sum referred to as the Total Indebtedness (the "Total Indebtedness").

2. Repayment Schedule. Subject to the terms and conditions set forth herein, the Borrowers promise to pay to FOC or its assigns the amount of the Total Indebtedness subject to that certain Letter Agreement dated March 24, 1988 (the "Letter Agreement") from the Borrowers and the other parties thereto and FOC, which is incorporated herein and made a part hereof.

3. Subordination. The principal amount loaned to the Borrowers by FOC pursuant to the provisions of this Agreement is extended to convert an existing deficit in the Borrowers' trading accounts with FOC under arrangements whereby such borrowing will be subordinate to the indebtedness of the Borrowers to other creditors, which loans shall be subject in all respects to the risks of Borrowers' business as it is now or hereafter conducted.

FOC irrevocably agrees for itself and its assigns that the obligations of the Borrowers under this Agreement with respect to the payment of principal and interest are and shall be subordinate in right of payment and subject to the prior payment or provision for payment in full of all claims of all other present and future creditors of Borrowers arising out of any matter occurring prior to the due date of any payment obligation under the Letter Agreement or Subordinated Notes (hereinafter defined) and that,

in the event of any receivership, insolvency, bankruptcy, assignment for the benefit of creditors, or any other marshalling of the assets and liabilities of any Borrower, the holder hereof shall not be entitled to participate or share, ratably or otherwise, in the distribution of the assets of such Borrower until all claims of all other present and future creditors of such Borrower arising out of any matter occurring prior to the due date of any payment obligation under the Letter Agreement or Subordinated Notes (hereinafter defined) have been fully satisfied, or provision has been made therefor.

4. Notes. The Borrowers' obligation under this Agreement to pay FOC shall be evidenced by promissory notes in the form of Exhibit A-1 and A-2 attached hereto (the "Subordinated Notes"), which notes shall bear on their face a legend in substantially the following form:

> This Subordinated Note is issued subject to the provisions of a Subordinated Loan Agreement dated March 24, 1988, between First Options of Chicago, Inc., MK Investments, Inc. and Duck Brothers, Inc. and a Letter Agreement dated March 24, 1988 between same parties and others and the terms and conditions of said Subordinated Loan Agreement and Letter Agreement are incorporated herein by reference and made a part hereof.

5. Prepayment. Subject to the condition set forth below, any Borrower may from time to time prepay the Total Indebtedness or any payment due thereof, in whole or in part, without premium or penalty. No such prepayment shall be made at any time when such Borrower's equity in its account at FOC is less than the dollar amount of haircuts which such Borrower is required to take with respect to trading positions maintained by such Borrower and cleared through FOC, as determined by FOC pursuant to the terms of paragraph (c)(2)(x) of Rule 15c3-1 promulgated under the Securities Exchange Act of 1934 (the "Rule"), and no prepayment may be made if such prepayment creates a (c)(2)(x) charge under the terms of the Rule, unless such prepayment is specifically approved by the Philadelphia Stock Exchange, Inc. ("the Exchange") in advance.

6. Modification to Market Maker's Agreement; Exclusive Clearing.

(a) Notwithstanding the terms of the Market Maker Agreements listed on Exhibit B hereto, as any of them may have been from time to time amended, (the "Market Maker Agreements"), such Market Maker Agreements may not be terminated by any Borrower by notice or otherwise, until the Total Indebtedness set forth herein plus interest thereon, if any, is fully paid pursuant the provisions of the Letter Agreement to FOC and FOC acknowledges such payment in writing. At such time, either Borrower may terminate the Market Maker Agreements only pursuant to the terms of such Market Marker Agreements.

(b) Borrowers shall neither make nor continue arrangements with any other organization to execute and clear Borrowers' trades, nor will Borrowers self-execute and self-clear, without the prior written consent of FOC until the Total Indebtedness set forth herein plus interest thereon, if any, if fully paid to FOC and FOC acknowledges such payment in writing or unless FOC releases the Total Indebtedness pursuant to the provisions of the Letter Agreement.

(c) Borrowers agree that notwithstanding the agreement to arbitrate contained herein, the provisions of this Section 6 may be specifically enforced by order of any court of competent jurisdiction, and that this remedy shall be in addition to and not in limitation of all rights and remedies available to FOC under law and under the rules of any securities, options or futures exchange.

7. Covenants. To induce FOC to enter into this Agreement, each Borrower agrees that until the Total Indebtedness and interest thereon, if any, is paid in full as provided in the Letter Agreement or is released, neither Borrower shall without the prior written consent of FOC:

(a) Incur or permit to exist any indebtedness or liability on account of deposits or advances, or for borrowed money or for the deferred purchase price of any property, real or personal, or any services, except (1) liabilities arising in the ordinary course of Borrowers' options trading business maintained on a current basis;

(2) indebtedness outstanding on the date hereof and listed in Exhibit C; (3) loans from Mr. Kaplan to MK or Duck, such loans to be on a status equal to the Total Indebtedness and not having any superior rights than the Total Indebtedness (including without limitation no right to prepayment unless such prepayment would be in compliance with Section 5 hereunder but permitted if such requirements are met); provided, however, such loans may bear interest up to a maximum rate per annum equal to the Reference Rate from time to time in effect plus two percent (2%) per annum and; (4) Senior Liabilities (as defined in the Letter Agreement).

(b) Create, incur, assume or permit to exist any mortgage, pledge, title retention lien or other lien, encumbrance or security interest of any kind with respect to any assets now owned or hereafter acquired.

(c) Become or be a guarantor, or surety of, or otherwise become or be directly or contingently responsible in any manner with respect to any undertaking or obligation of another or make or permit to exist any loans or advances to another or investments in another except MK Investments, Inc. and Duck Brothers, Inc.

8. Events of Acceleration and their Effect. Each of the following shall constitute an Event of Acceleration under this Agreement, the Letter Agreement, the Subordinated Notes, the Guaranty and any other document referred to therein or herein.

(a) Any receivership, insolvency, dissolution, liquidation, bankruptcy, assignment for the benefit of creditors, reorganization whether or not pursuant to bankruptcy laws, or any other marshalling of the assets and liabilities of any Borrower.

(b) Any revocation or suspension for forty-five (45) calendar days or more of either Borrower's trading privileges on, or status as a member of, the Exchange.

(c) Any default of any Borrower in the payment of the principal or any interest payment due hereunder, the Subordinated Notes, the Guaranty, or the Letter Agreement, or any other payment required by the Letter Agreement if such default contin-

ues unremedied for five (5) days after telephonic or written notice thereof shall have been given to each Borrower by FOC.

(d) Any material breach of or failure to perform any covenant made by any Borrower in connection with the execution of this Agreement, the Letter Agreement, the Subordinated Notes, the Guaranty or any other document referred to therein or herein if such material breach or failure shall continue unremedied for ten (10) days after written notice thereof shall have been mailed or delivered to each Borrower by FOC.

(e) If any Borrower shall not be permitted to make any two (2) payments by reason of the restrictions imposed herein pursuant to paragraph (c)(2)(x) of the Rule.

(f) Any judgment being entered against any Borrower in an amount in excess of $250,000 and remaining unsatisfied during any period of 30 days unless during such period such judgment is effectively stayed by appeal or otherwise.

In case of the occurrence of any Event of Acceleration, the unpaid balance of the Total Indebtedness may at FOC's option, to the extent not already due and payable, forthwith mature and become due and payable without presentment, demand, protest or notice of any kind, all of which are hereby waived by the Borrowers. Upon the occurrence of any Event of Acceleration FOC shall have any remedies available to it under applicable law, including without limitation, debting the Trading Account (as defined in the Letter Agreement) in the amount of the balance thereof.

9. Governing Law. This Agreement shall be deemed to have been made under, and shall be governed by, the laws of the State of Illinois in all respects including matters of construction, validity and performance.

10. Arbitration. Except as set forth in Section 6, any controversy arising out of or relating to this Agreement, the Letter Agreement, the Subordinated Notes or any other document referred to herein or therein or the breach thereof shall be submitted to and settled by arbitration pursuant to the Constitution

and Rules of the Exchange. The parties hereto and all who may claim under them shall be conclusively bound by such arbitration.

11. On Whom Binding. This Agreement shall be binding and enforceable in accordance with its terms upon FOC and the Borrowers, and their respective successors and assigns.

12. Conflict. In the event of any conflict between the terms of this Subordinated Loan Agreement and the Letter Agreement, the Letter Agreement shall control in all respects.

13. Notices. Unless otherwise provided herein, any notice required or permitted to be given under this Agreement, the Letter Agreement or the Subordinated Notes or any other document referred to herein or therein shall be sufficiently given if in writing delivered to or sent by certified mail to the appropriate party at the address set forth below, or at any such other address as such party may from time to time specify for that purpose in a notice similarly given.

FOC's Address:

First Options of Chicago, Inc.
One Financial Place
440 South LaSalle Street
Chicago, Illinois 60605
Attention: Mr. Gary Windus

Borrowers' Address:

MK Investments, Inc.
910 Summit Avenue
Penn Valley, Pennsylvania 19072
Attention: Manuel Kaplan,
President

Duck Brothers, Inc.
949 Caledonia Street
Philadelphia, Pennsylvania 19128
Attention: Larry Goldberg,
President

14. Entire Agreement. This Agreement, the Letter Agreement, the Subordinated Notes and any documents referred to herein or therein embody the entire agreement between the parties

and no other evidence of such agreement has been or will be executed without the prior written consent of the Exchange.

Lender: FIRST OPTIONS OF CHICAGO, INC.

By: [sig.]
Title: V.P.

Borrowers: MK INVESTMENTS, INC.

By: Manuel Kaplan [sig.]
Title: President

DUCK BROTHERS, INC.

By: Larry Goldberg [sig.]
Title: President

EXHIBIT A-1

SUBORDINATED PROMISSORY NOTE

$6,227,188

Due: March 31, 1998
Chicago, Illinois: March 24, 1988

The undersigned, for value received, promises to pay to First Options of Chicago, Inc. ("FOC") at 440 South LaSalle Street, Chicago, Illinois 60605 the principal sum of SIX MILLION TWO HUNDRED TWENTY SEVEN THOUSAND ONE HUNDRED EIGHTY-EIGHT AND NO/100 DOLLARS ($6,227,188) payable on March 31, 1998 (the "Maturity Date").

Upon the occurrence of an Event of Acceleration (as defined in the Subordinated Loan Agreement, hereinafter defined), the undersigned further promises to pay to FOC interest on the aggregate unpaid principal amount hereof from time to time outstanding at a rate per annum equal to the Reference Rate in effect from time to time from the date of such Event of Acceleration until paid. Interest shall be computed on the basis of a year consisting of 360 days and paid for actual days elapsed. For purposes of this Subordinated Note, "Reference Rate" means, at any time, the rate of interest then most recently announced by the Continental Illinois National Bank and Trust Company of Chicago, at Chicago, Illinois, as its reference rate. Each change in the interest rate shall take effect on the effective date of the change in the Reference Rate.

THIS SUBORDINATED NOTE IS ISSUED SUBJECT TO THE PROVISIONS OF A SUBORDINATED LOAN AGREEMENT DATED MARCH 24, 1988, BETWEEN FIRST OPTIONS OF CHICAGO, INC., MK INVESTMENTS, INC. AND DUCK BROTHERS, INC. AND A LETTER AGREEMENT DATED MARCH 24, 1988 BETWEEN THE SAME AND OTHER PARTIES AND THE TERMS AND CONDITIONS OF SAID SUBORDINATED LOAN AGREEMENT AND LETTER AGREEMENT ARE INCORPORATED HEREIN BY REFERENCE AND MADE A PART HEREOF.

Address:
910 Summit Avenue
Penn Valley, Pennsylvania 19072
Attention: Manuel Kaplan,
President

MK INVESTMENTS, INC.

By: Manuel Kaplan [sig.]

Title: President

PHILADELPHIA STOCK EXCHANGE, INC.

In the Matter of Arbitration Between First Options of Chicago, Inc. and M.K. Investments, Inc.; Manuel Kaplan; and Carol Kaplan	DECISION

It is hereby determined and decided, after full consideration, that:

1) The Respondents' Motion to Dismiss for Lack of Jurisdiction, dated January 6, 1992, is hereby denied, and

2) The Claimant's Motion to Compel Production of Documents and Information dated January 13, 1992 and December 13, 1991 is hereby slated for oral argument. The date for oral presentation should be mutually agreed upon by the parties, and should be discussed with the Director of Arbitration. This date should be discussed and set upon receipt of this Decision.

Patricia Bird
Chairperson

PHILADELPHIA STOCK EXCHANGE, INC.

In the Matter of Arbitration Between	:	
First Options of Chicago, Inc.	:	
vs.	:	DECISION
MK Investments, Inc.;	:	
Manuel Kaplan; and Carol Kaplan	:	
	:	
	:	

Claimant, First Options of Chicago, Inc. asserted a Statement of Claim against MK Investments, Inc., Manuel Kaplan, and Carol Kaplan which was filed with and received by the Philadelphia Stock Exchange, Inc. on June 21, 1989. Claimant alleged responsibility on part of MK Investments, Inc. in the amount of $6,292,421.60 plus interest, costs and attorneys' fees for the amounts due pursuant to the March 24, 1988 Agreements. Also alleged, under the March 24, 1988 Letter Agreement, was Manuel Kaplan's and Carol Kaplan's liability to Claimamt for the remittance of 1987 state and federal taxation refunds in the approximate amount of $300,000.00 plus interest, costs and attorney's fees. In addition, Claimant alleged personal liability on the part of Manuel Kaplan, in the amount of $6,292,421.60, plus interest, costs and attorneys' fees, on the basis that Mr. Kaplan was a controlling person of MK Investments, Inc. Lastly, Claimant alleged that Manuel Kaplan is the alter ego of MK Investments, Inc. on the basis of Mr. Kaplan's failure to maintain a separate corporate existence and fraud. Claimant seeks $6,292,421.60 plus interest, costs and attorneys' fees with respect to the above allegation.

The Philadelphia Stock Exchange, Inc. received the Respondents' Answers to the Claimant's Statement of Claim on July 24, 1989. By way of her Answer, Carol Kaplan denied Claimant's allegation that she and Manuel Kaplan were under an obligation to assign to the Claimant the 1987 state and federal taxation refund.

Manuel Kaplan, by way of his Answer denied the allegations in Count I of the Statement of Claim and seeks to recover

$600,000.00 plus interest, costs and attorneys' fees. Manuel Kaplan also denied the allegations in Count II of the Statement of Claim and requests the panel to deny the same. As to Count III of the Statement of Claim, Manuel Kaplan denied the same and request the panel for an award for punitive damages in his favor of $1,000,000.00 for injury to his reputation. Manuel Kaplan further denied the allegations in Count IV of the Statement of Claim and requests the panel to enter an award in his favor for the defense of a spurious claim and for punitive damages. Manuel Kaplan further Counterclaimed in the amount of $10,000,000.00 for alleged interference with existing and prospective business opportunities, plus interest, costs and attorneys' fees. In addition, Manuel Kaplan further Counterclaimed in the amount of $10,000,000.00 on the basis of libel and slander, plus interest, costs and attorneys' fees.

MK Investments, Inc. denied the allegations in Counts I - IV of the Statement of Claim and seeks for itself the same remedy as requested by Manuel Kaplan pursuant to this Answer. MK Investments, Inc. further Counterclaimed in the amount of $650,000.00 for breach of contract, plus interest, costs and attorneys' fees. In addition, MK Investments, Inc. Counterclaimed for interference with existing and prospective business opportunities and for libel and slander, each Counterclaim for the amount of $10,000,000.00 plus interest, costs and attorneys' fees.

The arbitrators appointed and confirmed to resolve this matter are the following: Patricia Bird; John Beausang; Thomas Chancler; Harry Green, III; Doris Elwell; Allen Lang; and Elkins Wetherill. The hearings were conducted over eight hearing days, which were held in Philadelphia on the following dates: May 7, 8, 12, 13, 14, 21, 26 and 28, 1992.

After having heard and fully considered the proofs of the parties it is hereby decided and determined as follows:

(1) In favor of First Options of Chicago, Inc. and against MK Investments, Inc. and Manuel Kaplan, jointly and severally, in the amount of five million six hundred sixty-two thousand one hundred eighty-eight dollars

($5,662,188.00) plus interest from January 17, 1989 to the date of satisfaction of the award, the interest to be calculated at the rate of six percent (6%).

(2) In favor of First Options of Chicago, Inc. and against Manuel Kaplan and against Carol Kaplan, jointly and severally, in the amount of three hundred forty-six thousand three hundred forty-two dollars ($346,342.00) plus interest from January 17, 1989 to the date of satisfaction of the award, the interest to be calculated at the rate of six percent (6%).

(3) The Counterclaims of both MK Investments, Inc. and Manuel Kaplan, with respect to the alleged breach of contract, interference with existing and prospective business opportunities, and libel and slander, are denied in their entirety.

(4) The requests of MK Investments, Inc., Manuel Kaplan, and/or Carol Kaplan for attorneys' fees and punitive damages are denied in their entirety.

(5) The request of First Options of Chicago, Inc. for attorneys' fees is denied in its entirety.

(6) The costs associated with this arbitration proceeding are assessed in the following manner:

a. First Options of Chicago, Inc. is to remit to the Philadelphia Stock Exchange, Inc., the amount of four thousand two hundred fifty dollars ($4,250.00). This amount is to be received by the Philadelphia Stock Exchange, Inc. within ten (10) business days from receipt of this decision by the Claimant.

b. MK Investments, Inc., Manuel Kaplan, and Carol Kaplan, jointly and severally, are to remit to the Philadelphia Stock Exchange, Inc. the amount of four thousand two hundred fifty dollars ($4,250.00). This amount is to be received by the Philadelphia Stock

Exchange, Inc. within ten (10) business days from receipt of this decision by the Respondents.

[sig.] 6/5/92
Patricia Bird Dated
Chairperson

AFFIDAVIT OF RICHARD FEDER

Richard Feder, being duly sworn, deposes and says as follows:

1. I am one of the attorneys for Manuel Kaplan, Carol Kaplan and M.K. Investments, Inc. ("the Kaplans") in this matter. Donald Perelman, of this firm, and I represented the Kaplans in all phases of this matter since December, 1991.

2. In a telephone conversation with Lydia Gavalis, the PHLX Director of Arbitration, shortly after the Award in this case was issued, Ms. Gavalis informed me that the Panel held one deliberating session before reaching its decision.

3. At the discovery hearing on January 20, 1992, Mr. Perelman, on behalf of the Kaplans, objected to First Options' refusal to answer basic interrogatories seeking the facts known to First Options that supported its piercing-the-veil allegation. (The interrogatories can be found at R-158.) The Panel denied the objection, stating, "you're asking us to ask him to reveal his case right now and this is not the hearing." The Panel made clear that we would learn First Options' basis at the hearing, and there was no need for us to learn it any sooner.

4. On or about May 21, 1992, we received a letter from Ms. Gavalis enclosing a transcript of First Options' examination of Mr. Kaplan. The letter stated, inter alia: "The transcription was made at the request of the Claimant. No future transcriptions will be made by the PHLX due to the burden related thereto." (R-196)

5. Upon receipt of this letter, I called Ms. Gavalis to inquire about its message. She informed me that First Options' counsel had requested the transcript, that the PHLX had never provided such a service before, and (because of its difficulty) never will do so again.

6. After learning that the Panel had scheduled the hearing to include a Saturday session, I informed Ms. Gavalis, that Mr. Kaplan generally attended synagogue on Saturday mornings, and requested that the Saturday session either be cancelled or delayed

until the afternoon. Ms. Gavalis responded: "Manny will just have to skip synagogue that day."

7. First Options then requested a postponement of the hearing, at the January 20, 1992 discovery hearing. The postponement was granted, and the hearing ultimately was scheduled to include a Friday evening session.

8. I informed Ms. Gavalis that Mr. Kaplan generally attended synagogue on Friday evenings, and requested that the Friday session conclude by 7:30 P.M. Ms. Gavalis denied the request.

_____
Richard Feder

[Notarized]

AFFIDAVIT OF LYDIA GAVALIS

LYDIA GAVALIS, being first duly sworn on oath, deposes and says as follows:

15. I currently am the Director of Arbitration of the Philadelphia Stock Exchange, Inc. ("Exchange"). In February, 1990, my title was Associate Director of Arbitration of the Exchange.

16. On July 24, 1989, in the arbitration proceeding of First Options of Chicago, Inc. v. MK Investments, Inc., Manuel Kaplan and Carol Kaplan, Manuel Kaplan and Carol Kaplan filed their respective objections to the statement of claim of First Options of Chicago, Inc. These objections challenged the jurisdiction of the Exchange over Manuel Kaplan and Carol Kaplan, respectively. Copies of the objections of Manuel Kaplan and Carol Kaplan are attached hereto as Exhibits "A" and "B", respectively.

17. In my role as Associate Director of Arbitration, on February 26, 1990 I attended a pre-hearing conference in the aforementioned arbitration proceeding. At this pre-hearing conference, Thomas Zielinsky, then-counsel for Manuel Kaplan and Carol Kaplan, withdrew his clients' objections to jurisdiction filed on July 24, 1989. In light of the withdrawal of these objections, the arbitrators' decision dated February 27, 1990 did not address the jurisdictional objections of Manuel Kaplan and Carol Kaplan. A copy of the February 27, 1990 Decision is attached hereto as Exhibit "C".

18. On January 6, 1992, the Motion and Supporting Memorandum of Respondents Manuel Kaplan and Carol Kaplan to Dismiss for Lack of Jurisdiction was filed with the Exchange. A copy of this Motion and Supporting Memorandum is attached hereto as Exhibit "D". In this Motion and Supporting Memorandum, Manuel Kaplan and Carol Kaplan again challenged the Exchange's jurisdiction over them. On January 14, 1992, the Arbitration Panel rendered a decision denying the Kaplans' January 6, 1992 Motion to Dismiss for Lack of Jurisdiction. A copy of the January 14, 1992 Decision is attached hereto as Exhibit "E".

19. On May 28, 1992, after closing arguments by the parties and at the conclusion of the hearing on the merits as per normal Exchange procedure, Patricia Bird, Panel Chairperson, stated as follows, "Before I declare this hearing closed will you affirm that all your evidence is in and that you have had an equal opportunity to be heard." Stephen P. Bedell, counsel for First Options, affirmed that all of First Options' evidence was in and that it had an equal opportunity to be heard. Mr. Perelman, counsel for MK Investments, Inc., Mr. Kaplan and Mrs. Kaplan (the "MK parties"), affirmed that, except for a submission of documents requested by the Panel regarding a specific trade concerning Federated Department Stores ("FDS") in MK Investments, Inc.'s account, all of his clients' evidence was in and that his clients had received an equal opportunity to be heard. The MK parties' additional documents concerning the FDS trade were received by the Exchange on June 2, 1992.

20. Michael Waber, a business associate of Mr. Kaplan's at the Exchange, was appointed to the Arbitration Panel in November 1991 but was removed in December 1991. On approximately December 20, 1991, I spoke with Mr. Bedell about the February 26, 1990 discovery order, and indicated that Mr. Waber participated on the Arbitration Committee that entered that order. Mr. Bedell registered an informal objection to Mr. Waber's participation therein and indicated a desire to file a formal objection with the Arbitration Panel. I indicated that the new Panel would be reviewing that order sua sponte for possible vacatur in light of Mr. Waber's participation. On January 10, 1992, the Arbitration Panel sua sponte vacated the February 26, 1990 discovery order.

21. By telecopy letter dated April 28, 1992, First Options' counsel requested the Panel to allow the telephone testimony of William Noble, J. Gary Windus, Jennet Lingle and/or Pat Moran. A copy of this letter is attached hereto as Exhibit "F". Counsel for the MK parties responded to this request by telecopy letter also dated April 28, 1992. A copy of this letter is attached hereto as Exhibit "G". I informed the parties by letter dated April 30, 1992 of the Panel's determination that "any witness may testify via teleconference call." A copy of my April 30, 1992 letter is

attached hereto as Exhibit "H". It is not unusual for an Exchange arbitration panel to allow telephonic testimony.

22. The arbitration hearing of this matter originally was scheduled to be held on November 15, 16 and 18, 1991. The hearing was subsequently rescheduled to January 16, 17, 18 and 20, 1992; then February 13, 14, 15 and 17, 1992; then April 8, 9, 10 and 11, 1992; then May 7, 8, 12 and 13, 1992. When the hearing had been set for November 1991, January 1992, February 1992, and April 1992, Saturday sessions had been scheduled.

23. Prior to the final continuance to May 1992, the MK parties' co-counsel, Richard Feder, requested that no Saturday hearings be held so that Mr. Kaplan could attend synagogue. I indicated to Mr. Feder that the rules allowed parties to appear by counsel and that Mr. Kaplan could choose to appear in person or by counsel at any Saturday sessions. I never stated to Mr. Feder that "Manny will just have to skip synagogue that day." The hearing was later rescheduled for Thursday, May 7, 1992; Friday, May 8, 1992; Tuesday, May 12, 1992; and Wednesday, May 13, 1992. No Saturday hearing sessions were held in this matter.

24. After the hearing was set for the May 1992 dates set forth above, Mr. Feder asked that any Friday sessions be concluded by 7:30 p.m. This request was denied by the Exchange after consultation with the panel chairperson and the general counsel for the Exchange. One Friday hearing session was held in this matter; on Friday, May 8, 1992.

25. At the January 20, 1992 pre-hearing conference, the parties by agreement requested that the hearing be rescheduled to early April 1992.

26. The Exchange interprets its rules to require that awards entered in member controversies require only the certification of the decision by the chairperson of the Arbitration Panel, not the signatures of all arbitrators concurring in the award. This interpretation is based on Section 37(a) of Rule 950 of the Board of Governors of the Philadelphia Stock Exchange which states:

> All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by applicable law with respect to public controversies. With respect to member controversies, the Chairman of the panel will certify the decision of the panel in writing. Such awards may be entered as a judgment in any court of competent jurisdiction.

The provision of Section 37(a) requiring written certification by the Panel's chairperson with respect to member controversies is deemed to supersede the provision of Section 37(e) requiring that awards include the signatures of the arbitrators concurring therein, which is deemed to apply only to awards rendered with respect to public controversies.

27. The arbitration proceeding between First Options and the MK parties was a "member controversy".

IN WITNESS WHEREOF, I have set my hand and affixed the seal of the corporation this 31st day of July, 1992.

LYDIA GAVALIS

[Notarized]

AFFIDAVIT OF STEPHEN P. BEDELL

STEPHEN P. BEDELL, being first duly sworn on oath, deposes and says as follows:

1. I am counsel of record for First Options of Chicago, Inc. ("First Options") in the above-captioned action. I was similarly counsel of record for First Options throughout the entire course of the arbitration proceeding underlying this action.

2. On June 21, 1989, First Options filed a Statement of Claim against MK Investments, Inc., Manuel Kaplan and Carol Kaplan with the Philadelphia Stock Exchange (the "Exchange"). On July 24, 1989, Manuel Kaplan and Carol Kaplan submitted written objections to the jurisdiction of the Exchange.

3. At a pre-hearing conference before the Exchange's Arbitration Committee on February 26, 1990, I suggested that the jurisdictional objections of Mr. and Mrs. Kaplan should be resolved before the Arbitration Committee addressed the other issues to be presented at that conference. At that time, Thomas Zielinsky, then-counsel for Mr. and Mrs. Kaplan (and MK Investments), expressly withdrew the Kaplans' pending jurisdictional objections.

4. On or about December 20, 1991, I spoke by telephone with Lydia Gavalis, the Director of Arbitration at the Exchange. Ms. Gavalis indicated that Michael Waber had been removed from the arbitration panel assigned to this matter, but that Mr. Waber had participated in the February 26, 1990 decision of the Arbitration Committee. I indicated to Ms. Gavalis that such participation by Mr. Waber was improper and that, upon formation of a final arbitration panel, I intended to object on behalf of Fist Options to the Arbitration Committee's February 26, 1990 decision based, in part, on the participation of Mr. Waber therein. Ms. Gavalis indicated that the panel would be reviewing the matter and would consider vacating the award sua sponte to avoid the appearance of bias, if warranted. By letter dated December 20, 1990 to Ms. Gavalis, a copy of which was sent to Donald Perelman, counsel for MK Investments, Inc., Manual Kaplan and Carol Kaplan, I

confirmed this conversation. A copy of this letter is attached as Exhibit "A."

5. The final arbitration panel was constituted in December 1991, and on January 10, 1992, the panel vacated the February 26, 1990 discovery order.

FURTHER AFFIANT SAYETH NOT.

IN WITNESS WHEREOF, I have set my hand this 6th day of August, 1992.

_____
STEPHEN P. BEDELL

[Notarized]

AFFIDAVIT OF DONALD L. PERELMAN

Donald L. Perelman, being duly sworn, deposes and says as follows:

1. I am counsel to Manuel Kaplan, Carol Kaplan and M.K. Investments, Inc.

2. In speaking with Lydia Gavalis, PHLX Director of Arbitration, after the Panel denied the Kaplans' motion to dismiss for lack of jurisdiction, I expressed my surprise at that decision. Ms. Gavalis responded by explaining how the Exchange had purportedly interpreted its jurisdiction rules in the past. She made absolutely no mention of any purported withdrawal or waiver of the objection.

3. Ms. Gavalis gave me the distinct understanding that the motion was denied on the merits.

4. Seymour Specter was not "duped" into accepting service of a subpoena. I spoke with Mr. Specter several times prior to my meeting with him, and explained quite clearly Mr. Kaplan's case and our need for an expert witness. He expressed enthusiasm for Mr. Kaplan's position, and expressed serious disapproval of First Options' conduct. Mr. Specter expressly stated that he would be happy to testify for the Kaplans, but that he was reluctant to do so voluntarily. He therefore agreed with me that he would accept service of a subpoena, and agreed to meet me at MKI's accountant's office for that purpose.

5. At the time we determined to use Mr. Specter as a witness, and at the time we included him on our witness list, we had not yet received First Options' witness list and had no idea that First Options also intended to use a Bear Stearns employee as a witness.

6. At or about the time that Bear Stearns filed its motion to quash the subpoena, Mr. Specter called me from a pay phone to inform me that Mr. Tallento and Bear Stearns counsel had confronted him and, with First Options' counsel on the speaker-

phone, expressed serious reservations about him testifying, and implied that his job might be in jeopardy. Mr. Specter informed me that, to save his job, he fibbed, and told Mr. Tallento et al. that he had been "duped" into meeting with me. I told Mr. Specter that I understood his situation, and that we accordingly would withdraw the subpoena.

7. I subsequently called Bear Stearns counsel. He informed me that First Options' counsel had called him to express concern about Mr. Specter testifying, and that, with First Options' counsel still on the line, he (Bear Stearns counsel) spoke with Mr. Tallento about the situation. He also informed me that, with First Options' counsel still on the line, they confronted Mr. Specter to discuss the situation, and that Mr. Specter informed him that he had been "duped" into meeting with me.

_____
Donald Perelman

[Notarized]

STIPULATION OF FACTS

Solely for purposes of resolving Petitioners' Motion to Vacate and Respondent's Cross-Motion to Confirm, and not for any other purpose, and without any agreement regarding materiality, the parties hereby stipulate to the following facts. The parties further agree that no testimony is necessary to resolve the disputed issues of fact presented by the parties and that this matter can be resolved solely on the basis of the papers presented to the Court to date.

1. On June 21, 1989, First Options of Chicago, Inc. ("First Options") filed a Statement of Claim with the Philadelphia Stock Exchange ("Exchange") against MK Investments, Inc. ("MKI"), Manuel Kaplan and Carol Kaplan alleging the following causes of action:

a. breach of contract against MKI for $6,292,421.60;

b. breach of contract against Mr. and Mrs. Kaplan for approximately $300,000;

c. controlling person liability against Mr. Kaplan for $6,292,421.60;

d. alter-ego liability against Mr. Kaplan for $6,292,421.60; and

e. interests, costs and attorneys fees against MKI, Mr. Kaplan and Mrs. Kaplan. (R. 1-10)

2. First Options filed a Submission Agreement signed by First Options and MKI. Manuel Kaplan and Carol Kaplan never signed any submission agreement.

3. On July 24, 1989, Manuel Kaplan, Carol Kaplan and M.K. Investments, Inc. filed their respective Responses, denying liability. MKI and Mr. Kaplan filed counterclaims against First Options, each seeking $10,000,000 from First Options for breach of contract, interference with prospective business opportunity and libel and slander. (R. 75-79, 99-102, 117-121, 124-128)

4. On July 24, 1989, Manuel Kaplan and Carol Kaplan submitted to the arbitrators written objections to the jurisdiction of

the Philadelphia Stock Exchange. (R. 111, 114) These objections asserted that "The Philadelphia Stock Exchange . . . and the Arbitration Committee . . . lack jurisdiction over this matter and the purported claim should be dismissed." (R. 111, 114.)

5. The Kaplans' then-counsel Thomas Zielinsky withdrew the Kaplans' jurisdiction objections from consideration at the February 26, 1990 discovery conference. The Kaplans thereafter participated without objection in the pre-hearing conference on February 26, 1990.

6. The February 26, 1990 discovery order made no mention of the jurisdictional issue.

7. Neither the Kaplans nor First Options submitted any contemporaneous papers to the Exchange confirming the withdrawal of the Kaplans' jurisdictional objections.

8. Correspondence was exchanged between counsel for the parties and the Exchange between February, 1990 and December, 1991. No discovery proceeded in this matter between February, 1990 and December, 1991, on outstanding discovery requests or otherwise.

9. The Kaplans' current counsel formally replaced former counsel in November, 1991, and received the file in this case in December, 1991.

10. The Panel issued no rulings and conducted no proceedings between February 26, 1990 and January 10, 1992.

11. On January 6, 1992, the Kaplans filed a motion and supporting memorandum seeking the dismissal of the claims against them for lack of jurisdiction. (R. 133) Therein, the Kaplans asserted that no ruling had been issued on the objections they had filed two years earlier and that they were "reiterat[ing] and renew[ing] their objections to the Committee's jurisdiction." (Id.) This memorandum did not state that the earlier jurisdictional objections had been withdrawn. (Id.)

12. The arbitration panel denied the Kaplans' motion to dismiss on January 14, 1992.

13. The Kaplans never sought relief from the courts to enjoin the arbitration.

14. The Kaplans' counsel called Lydia Gavalis after the Panel's denial of the motion. Ms. Gavalis told him that the Exchange had always interpreted its jurisdiction rules in the past to include people like Mr. Kaplan. Ms. Gavalis did not mention to the Kaplans' counsel any withdrawal or waiver of the objection.

15. Lydia Gavalis is the Exchange Director of Arbitration.

a. Ms. Gavalis participated in all Panel hearings.

b. Ms. Gavalis provided counsel to the Panel on many procedural and evidentiary rulings.

c. Ms. Gavalis was the contact-person for counsel with respect to all procedural inquiries.

d. Ms. Gavalis reports directly to William Uchimoto, Exchange General Counsel, who consulted with her on certain decisions in this case.

16. First Options is and has been at all relevant times a member of the Exchange.

17. MKI was a member corporation of the Exchange at all relevant times and has never contested the Exchange's jurisdiction to enter the underlying award against it.

18. From November 8, 1981 to December 8, 1987, Mr. Kaplan personally was a member of the Exchange. (R. 221, T-47) He has not personally been a member of the Exchange since then.

19. As of October 19, 1987 and thereafter, Manuel Kaplan was the sole shareholder, and an officer and director of MKI.

20. Prior to and at the time of the hearing, Mr. Kaplan was a limited partner in G&K Partners, Ltd., which was and is a member firm at the Exchange.

21. In connection with the March 24, 1988 Work-Out-Agreement, several documents were executed by First Options,

MKI, the Kaplans and others. These documents include the following:

Agreement	Parties
(1) Letter Agreement (R. 13-28)	First Options of Chicago, Inc. MK Investments, Inc. Duck Brothers, Inc. Options Investors, Inc. Manuel Kaplan Carol Kaplan Larry Goldberg Ed Manfield Isabelle Benton
(2) Guaranty (R. 29-33)	MK Investments, Inc.
(3) Subordinated Loan Agreement (R. 44-49)	First Options of Chicago, Inc. MK Investments, Inc. Duck Brothers, Inc.
(4) Surbordinated Promissory Note (R. 50)	MK Investments, Inc.

These documents all were executed on or about March 24, 1988. (R. 13-50; T-59)

Vacatur of February 26, 1990 Discovery Order

22. The February 26, 1990 discovery order was entered by a quorum of the Exchange's Arbitration Committee (not by the subsequently appointed arbitration panel). The Order did not identify the individual committee members participating in the decision.

23. One of the members of the Committee who participated in the February 26, 1990 conference was Michael Waber.

24. Mr. Waber's company, Waber Options, participated with MKI in a joint trading venture known as DKW Trading (R. 649),

and Mr. Waber was and is a personal friend of Mr. Kaplan (R. 669).

25. First Options was aware of Waber's joint venture with MKI since the mid 1980s.

26. First Options was aware that Michael Waber was a member of the Arbitration Committee, prior to February 26, 1990, and the membership of the Committee was publicly available at the Exchange.

27. At the outset of the discovery conference on January 20, 1992 and at the outset of the hearing on the merits on May 7, 1992, each arbitrator identified himself or herself.

28. The February 26, 1990 discovery order, inter alia, denied First Options' request for discovery of documents which were prepared before March 24, 1988.

29. In December 1991, First Options' counsel spoke with Ms. Gavalis, the Director of Arbitration, and challenged the validity of the decision based on the participation of Michael Waber. Bedell Affidavit ¶ 4; Gavalis Affidavit ¶ 6. First Options' counsel confirmed his conversation with Ms. Gavalis by letter to Ms. Gavalis, copied to Petitioners' counsel. Bedell Affidavit ¶ 4.

30. After the seven-person arbitration panel was constituted in January 1992 to arbitrate the dispute between the parties, the panel on January 10, 1992, sua sponte vacated the February 26, 1990 decision. Gavalis Affidavit ¶ 6.

Morgan Stanley Proceeding

31. After filing its Statement of Claim, First Options requested the Exchange to produce the taped recording of the arbitration hearing between MKI and Morgan Stanley that had been held on the Exchange.

32. On October 2, 1989, the Kaplans, by their counsel, submitted a letter to the Exchange objecting to First Options' request, and requesting the Exchange to preclude Morgan Stanley from providing a copy of the tape to First Options.

33. On October 4, 1989, the Exchange, by letter to First Options copied to the Kaplans' counsel, denied First Options' request.

34. On August 7, 1990, by letter from Morgan Stanley counsel to the Exchange, Morgan Stanley requested a copy of the tape recording of an arbitration between MKI and Morgan Stanley, for the purpose of providing that tape to First Options for possible use in its arbitration against the Kaplans. The letter was not cc:ed to the Kaplans or their counsel.

35. Subsequent to August 7, 1990, the Exchange gave Morgan Stanley's counsel a copy of the tape recording of an arbitration between MKI and Morgan Stanley, which Morgan Stanley's counsel then gave to First Options' counsel. The Kaplans were not informed of either transfer of the tape.

36. At the hearing of the present dispute, First Options used in the cross examination of Mr. Kaplan an excerpt from Mr. Kaplan's testimony in the Morgan Stanley proceeding.

Denial of the Parties' Contention Interrogatories

37. On December 14, 1991, Petitioners filed their Second Set of Interrogatories, which sought the facts or bases for the piercing the corporate veil claims. (R. 158) First Options objected to these interrogatories as "contention interrogatories" which First Options contended are inappropriate in arbitrations. The arbitrators sustained First Options' objections in this regard. Thereafter, First Options filed its Second Request for Information, attached as Exhibit A, which sought information relating to MKI's and Mr. Kaplan's counterclaims. All five interrogatories contained in First Options' Second Request for Information—which Petitioners characterized as contention interrogatories—were stricken by the panel on the same basis.

Kevin McCarthy

38. In a telephone conversation between counsel approximately twelve days prior to the hearing on the merits, the Petitioners' counsel suggested that the parties identify their respective witnesses with an address, phone number, employer

and/or title, as well as a name. First Options' counsel stated that such information is not required by the PHLX Rules. First Options' counsel told the Kaplans' counsel that if he disagreed with this interpretation, he could contact Ms. Gavalis. Petitioners' counsel did not contact Ms. Gavalis in this regard.

39. The best recollection of the Kaplans' counsel is that First Options' counsel also stated that the Kaplans would recognize all of First Options witnesses, and that there would be no surprises. The best recollection of First Options' counsel is that he stated only that there would be no surprises. The parties agree that testimony will not further illuminate this issue.

40. On January 3, 1992, First Options issued a subpoena to Kevin McCarthy, branch manager of Wagner Stott, a clearing firm at the PHLX.

41. One of First Options' identified witnesses was Kevin McCarthy. In identifying Mr. McCarthy, First Options did not state that he was an accountant. No previous correspondence or conversation between the parties referred to Kevin McCarthy, the accountant.

42. At the hearing, First Options presented as a witness Kevin McCarthy, an accountant from Chicago.

Accounting Exhibits

43. First Options introduced into evidence, over objection, nine typewritten documents relating to Mr. McCarthy's testimony that had not previously been produced in discovery or exchanged prior to the hearing.

44. First Options' counsel called Ms. Gavalis prior to the hearing to confirm their understanding that summaries, compilations and analyses did not need to be produced prior to the hearing and she said that they did not. The Kaplans' counsel were not party to this conversation, and were unaware of it until it was discussed at the hearing, during Mr. McCarthy's testimony.

45. Thereafter, Petitioners submitted summaries of their accounting expert's testimony. (Supp. R. 189) None of these documents were disclosed prior to the hearing.

46. Petitioners produced certain bank statements, checks and financial records on May 6, 1992. The arbitrators denied First Options' objections to the timing of this disclosure. (T-9)

Complaint Regarding Closing Arguments

47. The Panel denied the Kaplans' request for rebuttal of First Options' closing argument, at the hearing.

48. On June 2, 1992, the Kaplans filed a Motion for Reconsideration of Denial of Rebuttal and Motion to Strike.

49. First Options submitted no response to the Kaplans' Motion for Reconsideration of Denial of Rebuttal and Motion to Strike.

50. On June 4, 1992, the Panel denied the Kaplans' Motion for Reconsideration of Denial of Rebuttal and Motion to Strike.

51. The Kaplans requested two hours for closing argument.

52. The Panel initially granted twenty minutes to each side for closing argument. After an executive session, the Panel granted forty minutes to each side for closing argument.

Telephonic Testimony

53. First Options requested permission to present the testimony of Mr. Noble, Mr. Windus, Ms. Lingle and Mr. Moran (residents of Chicago and Singapore) by telephone ten days prior to the hearing, and Petitioners opposed this request. Gavalis Affidavit, Ex. "F" and "G". Petitioners did not make any request to present any of their witnesses by telephone. The panel issued a decision dated April 30, 1992 allowing "any witness" of any party to testify by telephone. Gavalis Affidavit, Ex. "H". At the hearing, First Options presented Mr. Noble, Mr. Windus and Ms. Lingle by telephone. Petitioners cross-examined these witnesses at the hearing, with the exception of Mr. Windus on rebuttal, who was questioned only by the Panel on rebuttal. (T-148-57, 276-90,

346-371) None of the three witnesses who testified by telephone were employed by First Options at the time of the hearing. (T-144, 269, 346)

Transcription of Testimony

54. First Options' counsel asked Ms. Gavalis to transcribe one day of Mr. Kaplan's testimony.

55. On May 20, 1992, Ms. Gavalis sent the parties a letter enclosing the requested transcript, and stating the following:

> Enclosed please find one copy of the transcript of Manny's adverse testimony. You may review the same and make any appropriate changes thereto. Once the final changes have been implemented one copy of the same will be provided to the arbitrators. The transcription was made at the request of the Claimant. No future transcriptions will be made by the PHLX due to the burden related thereto.

56. The Kaplans were unaware of First Options' request prior to receipt of Ms. Gavalis' letter.

57. Upon receipt of Ms. Gavalis' letter, the Kaplans' counsel telephoned Ms. Gavalis to inquire about the letter's message, and Ms. Gavalis informed the Kaplans' counsel that First Options' counsel had requested the transcript, that the PHLX had never provided such a service before, and, because of its difficulty, will not do so again.

58. Petitioners' counsel never objected to the Exchange having transcribed Mr. Kaplan's adverse examination or to any decision by the Exchange to refrain from transcribing additional testimony. Petitioners never asked the Exchange to transcribe any testimony.

Insensitivity to Religious Practice

59. The Exchange scheduled Saturday hearing dates for the sessions set in November 1991, January 1992, February 1992 and April 1992.

60. With respect to the April, 1992 scheduled hearing, the Kaplans' counsel informed Lydia Gavalis that Mr. Kaplan regularly attended synagogue on Saturdays, and requested that no Saturday hearings be held, or that any Saturday sessions be held in the afternoon. Ms. Gavalis informed Petitioners' counsel that the request was denied. The best recollection of Petitioners' counsel is that Ms. Gavalis stated that "Manny will just have to skip synagogue that day." The best recollection of Ms. Gavalis is that she did not state "Manny will just have to skip synagogue that day." The parties agree that testimony will not further illuminate the issue. Ms. Gavalis informed the Kaplans' counsel that Mr. Kaplan could choose to appear in person or by counsel at any Saturday session.

61. The entire hearing subsequently was rescheduled to commence in May 1992 and no Saturday hearings were ever held. (Gavalis Affidavit ¶ 9)

62. After the hearing was set for the May, 1992 dates, the Kaplans' counsel telephoned Ms. Gavalis and requested that any Friday sessions conclude by 7:30 P.M., so that Mr. Kaplan could attend synagogue. Ms. Gavalis informed Petitioners' counsel that the request was denied.

Testimony of Mr. Mullen

63. During the deposition of Timothy Mullen, an officer of First Options, First Options' counsel instructed Mr. Mullen not to answer on relevance grounds, numerous questions regarding the 1987 debit and First Options' trading strategies and trading approach to the MKI account after First Options took over the account in 1987. First Options' counsel argued that MKI and Manuel Kaplan had acknowledged the amount of the 1987 Debit in the Work-Out agreement and never raised any issue about validity of the 1987 debit in their pleadings or otherwise in the arbitration prior to Mr. Mullen's deposition. In its Response to the Statement of Claim, filed on July 24, 1989, MKI denied that it was responsible for the full debt, and stated:

> 1. The MKI trading account incurred a debit balance in the principal amount of $5,176,953.00, but the

incursion of the debit was not attributable entirely to the trading activities of MKI.

2. As of March 24, 1988, as a result of entering into the Agreement, MKI became indebted to First Options in the aggregate amount of $6,227,188.

64. Following Mr. Mullen's deposition, First Options moved to preclude Petitioners from contesting at the hearing the validity of the 1987 debit and for a protective order. (Suppl. R. 193.) The panel ruled that evidence regarding the amount of the 1987 debit would be admissible at the hearing. Petitioners did not file a motion to compel testimony by Mr. Mullen on this point. Petitioners did not file a motion in limine prior to the hearing.

65. The Panel allowed First Options to introduce testimony from Mr. Mullen regarding First Options' trading strategies and trading approach to the MKI account after First Options took over the account in 1987.

The Award

66. On June 5, 1992, the PHLX issued an Award, as follows:

a. MKI and Mr. Kaplan are jointly liable for $5,662,188, plus interest from January 17, 1989 to the date of satisfaction of the Award;

b. Mr. Kaplan and Mrs. Kaplan are jointly liable for $346,342, plus interest from January 17, 1989 to the date of satisfaction of the Award; and

c. The counterclaims of Mr. Kaplan and MKI are denied.

67. The Panel held one deliberating session prior to issuing the Award.

68. Ms. Gavalis informed Petitioners' counsel that the Panel's vote was 5 in favor and 2 against the Award.

69. Ms. Gavalis informed Petitioners' counsel that the Panel's vote was 5 in favor and 2 against the Award.

70. The June 5, 1992 Award is signed by Patricia Bird, Chairperson. It is not signed by any other member of the Panel.

The Parties

71. Carol Kaplan never has been a member of the Philadelphia Stock Exchange.

72. Manuel Kaplan has not conducted any business on behalf of MKI at the Exchange since January 17, 1989.

73. Manuel Kaplan has not actively engaged in the options business on behalf of MKI since January 17, 1989.

74. MKI has not conducted any business at the Exchange since June, 1989.

75. First Options is the largest options clearing firm at the Exchange.

Other Issues

76. No testimony is necessary to resolve these cross-motions. The Court can make all necessary findings based on the papers submitted by the parties, to date.

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Date: September 2, 1992

SUPPLEMENTAL STIPULATED FINDINGS OF FACT

Solely for purposes of resolving Petitioners' Motion to Vacate and Respondent's Cross-Motion to Confirm, and not for any other purpose, and without any agreement regarding materiality, the parties hereby stipulate to the following facts. The parties further agree that no testimony is necessary to resolve the dispute issues of fact presented by the parties and that this matter can be resolved solely on the basis of the papers presented to the Court to date.

1. At the beginning of the hearing, the parties' counsel presented argument to the arbitration panel regarding the propriety of the Petitioners' subpoena issued to Seymour Specter. (Tr. 3-6.) Immediately after these arguments, the panel and Petitioners' counsel had the following exchange:

> PANEL: Are you now withdrawing [Mr. Specter] as witness?
>
> PERELMAN: I think I have to, but I would like the panel to keep in mind that with First Options having started the process, I'm now in a position where a couple of days before the hearing I lose my expert witness . . . .
>
> PANEL: [All right, you are, at this time, withdrawing him?]
>
> PERELMAN: I think we have to. (Tr. 6.)

2. First Options called Scott Talento of Bear, Stearns & Co. as a expert witness. (Tr. 291.) During cross-examination of Mr. Talento, Petitioners sought information regarding Seymour Specter, an employee of Bear, Stearns & Co. Following an objection by First Options to the relevancy of this line of questioning, the panel held an executive session and they sustained the objection. (P. 302-303.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

MICHAEL KAPLAN, et al.,	:	CIVIL ACTION
	:	NO. 92-MC-0210
Petitioners	:	
	:	Philadelphia Pennsylvania
v.	:	September 2, 1992
	:	
FIRST OPTIONS OF CHICAGO,	:	
Respondent	:	
	:	
. . . . .	:	

HEARING
BEFORE THE HONORABLE JAY C. WALDMAN
UNITED STATES DISTRICT JUDGE

- - -

APPEARANCES:

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- - -

(Whereupon the following occurred in open court at 3:20 o'clock p.m.:)

THE COURT: Please be seated. We are here in the case of Kaplan and MK Investments, Incorporated, versus First Options of Chicago, Incorporated at Miscellaneous Action No. 92-0210.

The Court has before it cross petitions of the parties, one from the—from MK and the Kaplans to vacate an arbitration award and one from First Options to enforce and reduce to judgment such award.

Also the Court has before it various matters submitted by the parties including portions of the record, an affidavit and so forth, and also proposed findings of fact and I'm not sure if I ever received proposed conclusions of law. If I did, I don't seem to have it here.

MR. McDERMOTT: Your Honor, if I may, you did not receive proposed conclusions of law. I was not under the impression that we were—had been asked to prepare them at this point and Mr. Feder had prepared some. I did not have mine ready so we didn't submit them.

THE COURT: Well, I wouldn't have asked for proposed conclusions of fact and not proposed conclusions of law.

But in any event, most—well, I guess it's fair to say that virtually all of the facts appear to be stipulated to, although the parties obviously don't necessarily draw the same conclusions from those facts and they don't necessarily place the same interpretation on those facts, but perhaps most to the point, the parties do appear to stipulate that no evidence or testimony need be or will be presented on these cross motions beyond the record already adduced. And presumably thereby the parties are agreeing that the Court has in front of it anything that either party thinks is at all material, relevant or pertinent to decide the issues in the case.

Is that right?

MR. FEDER: Yes, sir.

MR. McDERMOTT: Yes, sir.

THE COURT: Well, if that's so, then—now, there was an affidavit of Ms. Gavalis, but again no one is—apparently you've agreed that what she would testify to if she has been called to testify in person subject to cross-examination is in fact what she said in her affidavit, I take it.

MR. FEDER: For the most part, yes, your Honor.

THE COURT: Well, I don't want there to be the slightest doubt or confusion on the record. There is no fact that in any way is relevant, material or pertinent that you disagree on or that cannot be ascertained according to all parties by reference to the matters already of record.

Is that what you're —

MR. FEDER: Your Honor, if I could clarify, there are two facts which are not of major significance but they are arguably material where there clearly is a disputed recollection between the parties. Neither party chooses to question the good faith of each other's recollection and we have submitted to the Court conflicting recollections, but ask, but submit to the Court that there's no purpose to be served by cross-examination of the other party's recollection of particular facts.

My guess is the Court will find that it's not going to need to resolve the dispute regardless the parties have agreed to stipulate.

THE COURT: Well, I'm not sure what you're referring to, but if it's material and you can't agree on what happened, how am I supposed to determine what happened if we don't have any evidence or testimony?

MR. FEDER: I think it will become clearer in argument. It's hard to answer that in the abstract, other than it may not be material.

THE COURT: Well—

MR. McDERMOTT: If I could, your Honor, put the comments in, just put the comments in context that the two points that apply in this situation are, one, whether or not when counsel

for petitioners were speaking with Ms. Gavalis on the phone regarding a rescheduling matter, she said, quote "Manny will just have to skip synagogue that day."

Counsel for petitioner recalls her saying that, Ms. Gavalis does not—recalls not saying those words. Our position, First Option's position is that's not a material fact which need —

THE COURT: Well, this goes to one of the 14 allegations of bias?

MR. FEDER: Yes, sir.

THE COURT: That they wouldn't let one of the parties take off for a religious observance or something, is that it? Well, why wouldn't that conceivably be material?

MR. FEDER: Because, your Honor, it's agreed as to the substance of the conversation that she would not let the party take off for a religious observance. The exact language that she used we are willing to —

THE COURT: Oh. Well, let me understand this because it's uncontested that the party asked for a continuance for the purpose of attending a religious observance. I take it that—is that uncontested?

MR. McDERMOTT: Yes.

THE COURT: And she said no?

MR. McDERMOTT: Correct, yes, correct.

THE COURT: What's contested is whether she also made some gratuitous statement about whatever it is you just said.

MR. McDERMOTT: Correct.

THE COURT: "You will just have to miss your holiday" or words to that effect?

MR. McDERMOTT: Correct.

THE COURT: Okay. All right. Well, let me again, because I want there to be no doubt of the question, putting that

one minor little thing aside, I want to make sure I understand this, there is no material fact to which either you have not stipulated or as to which you have not agreed the Court could ascertain it by reviewing the materials already submitted, is that correct?

MR. McDERMOTT: Your Honor, that is essentially correct. I do have with me today a set of First Options' exhibits which were the bulk of our paper case in chief at the arbitration.

In going through the transcript there are references to, during the witness' testimony, to Exhibit A, Exhibit B, et cetera. Some of these things were provided in the supplemental record, not all of them were provided —

THE COURT: You can't have it all ways. Now, if you have evidence or testimony to present, present it. I mean, I'm relying on your written stipulation, but apparently it's not altogether accurate. Put in front of me right now any testimony or evidence you have. I don't know what else to say.

MR. McDERMOTT: Your Honor, I guess then I'd just like to provide the Court with these documents, if I may.

THE COURT: Well, I don't know what they are. If your adversary stipulates to what they are and to their authenticity, then maybe you'll be able to get them in evidence without having to call a witness, I don't know.

MR. McDERMOTT: I did discuss with Mr. Feder that I would have these with me today and would offer them up, if it seemed appropriate. These are the exhibits that—copies of exhibits provided at the arbitration.

MR. FEDER: Your Honor, assuming those are the actual exhibits that were introduced at the hearing, we have no objection to their introduction.

THE COURT: The—this is a copy—

MR. McDERMOTT: Yes.

THE COURT: —of exhibits that were submitted to the seven arbitrators, is that what these are?

MR. McDERMOTT: Correct.

THE COURT: And that have not heretofore been submitted to the Court.

MR. McDERMOTT: Right.

THE COURT: And you agree that's what they are? No question as to their identity or authenticity?

MR. FEDER: I have not seen—I—why don't you give me a second to look through them.

(Pause.)

MR. FEDER: Your Honor, these appear to be—these certainly appear to be the documents that are presented to the arbitrators. I don't recall whether every one was admitted into the evidence. I have no objection to their entry into the record here.

THE COURT: Well, I need to have them not only identified and authenticated, I need to understand what they are. I mean, these are exhibits which you agree were actually submitted to the seven arbitrators. Is that what you're about to introduce here?

MR. McDERMOTT: Yes.

MR. FEDER: Yes, sir, by First Options.

MR. McDERMOTT: And the only—and the reason I'm providing them to the Court is because you have already been provided a transcript of the witness' testimony. I think it will assist you in—when referring to the transcript, to have the exhibits available.

THE COURT: I just want to make sure there's no contest as to what they are. These are the exhibits or at least accurate reproductions of the exhibits that were submitted to the seven arbitrators, is that correct?

MR. McDERMOTT: Yes.

MR. FEDER: Yes, sir.

THE COURT: And you are moving them into admission. Do you have any objection?

MR. FEDER: No, sir.

THE COURT: All right, we'll admit them.

MR. McDERMOTT: Thank you.

THE COURT: My question recurs, do you now agree that there is no material fact in this case either to which you have not stipulated or as to which the Court cannot make an adequate factual finding by reviewing matters that have been submitted and made part of the record, without taking further testimony or evidence?

MR. McDERMOTT: Yes.

MR. FEDER: I agree.

THE COURT: All right, if that's the case then we'll, I assume there's nothing more to do except afford you some time to argue, if you wish to do that.

MR. FEDER: We do, your Honor.

THE COURT: All right, well, I'll hear you.

MR. FEDER: Does the Court have a preference as to whether I stand here or at the podium?

THE COURT: No preference whatsoever; whatever makes you happy.

MR. FEDER: Thank you.

May it please the Court, I am Richard Feder. I represent petitioners Manuel Kaplan, Carol Kaplan and MK Investments, Inc.

It's pretty clear to me from the previous conference we had with the Court that your Honor is already fairly familiar with the issues, read the briefs. I will try to highlight what I think are the important points. I can't possibly cover the whole argument, the whole case, and I'm sure your Honor doesn't want me to.

THE COURT: We'll cover anything you think is important, but every now and then we get some free time so we do read the filings and the various briefs that are submitted.

MR. FEDER: And we lawyers try to keep that, your free time, to a minimum, I'm sure you feel.

Your Honor, Manny Kaplan was an options trader on the Philadelphia Stock Exchange from 1981 to 1989. In 1984 his partnership incorporated as —

THE COURT: Well, assume I'm familiar with the facts and why don't you focus your argument on the points that are in contention?

MR. FEDER: Certainly, your Honor.

THE COURT: That the arbitrators exceeded their authority, that they displayed bias—well, I guess the term is actually impartiality—and all of that kind of thing.

MR. FEDER: I will assume you're familiar with the facts.

Your Honor, First Options brought this case before the Philadelphia Stock Exchange Arbitration Panel seeking to pierce the corporate veil, seeking to impose contractual liability, impose personal liability on Mr. Kaplan for a debt that First Options contracted with the corporation.

Mr. Kaplan and Mrs. Kaplan, they also sued Mrs. Kaplan to pay over a tax refund which they had agreed to pay in —

THE COURT: Well, this was a joint tax refund for about $300,000 correct?

MR. FEDER: That's correct.

THE COURT: And therefore—I'm no expert on tax law, but if they filed a joint return and got a joint refund, they would own that jointly and severally, wouldn't they?

MR. FEDER: I would think so. I'm no expert on tax law, but regardless, the parties, Mrs. Kaplan signed that agreement.

THE COURT: This is how she got in the case, by signing the agreement, right?

MR. FEDER: Correct.

What Mrs. Kaplan did not sign and what Mr. Kaplan did not sign was any agreement to bring this dispute to arbitration, to bring any dispute with First Options.

THE COURT: Well, MK was a member of the Exchange and, as such, why was it not bound by the agreement that all members of the Exchange would arbitrate any disputes or grievances related to the securities business of either? And since the Exchange defines "member" to include any principal who is involved with a member?

MR. FEDER: I guess it's that last since that that we disagree with. I would argue quite strongly that you never even need to get to the rules because the parties had a specific contract divvying up what's going to go to arbitration, who's going to go to arbitration and who's not.

THE COURT: You're talking about the workout agreement?

MR. FEDER: Yes, sir. But I'll —

THE COURT: But can't we look for the source of an agreement to arbitrate in more than one place?

MR. FEDER: Certainly we can, but I think there's a general principle that says when parties specifically contract with respect to a particular issue, the fact that there are general rules out there don't apply when the parties clearly have the right to contract around those general rules and, your Honor, that is what happened here.

THE COURT: So you want me to read the arbitration provision in the so-called workout agreement as a subsequent agreement to limit the scope and applicability of the general arbitration agreement, is that what you're saying?

MR. FEDER: Without conceding for a moment that the general arbitration rules would apply here, yes, sir, that is exactly correct. I don't think you need to look to whether the general rules apply because the arbitration agreement had, the workout agreement—excuse me—had four separate documents, only one of which contained an arbitration provision and that one document was only signed by MK Investments, Inc. It was not signed by Manny Kaplan, it was not signed by Carol Kaplan. The parties clear intent was to—this workout agreement, as you know, was negotiated over four and a half months, both sides had very competent lawyers.

THE COURT: Well, I assume that always.

MR. FEDER: I probably went outside the record in stipulating that their—their lawyers were competent, but —

MR. McDERMOTT: I'd offer to stipulate to that.

MR. FEDER: The clear intent of the parties as expressed in this 28-page series of documents was that MK Investments would be subject to arbitration, Manny Kaplan and Carol Kaplan would not. If First Options wanted to subject Manny and Carol Kaplan to arbitration, it wouldn't have been very difficult to ask them to sign that provision or to put that provision in one of the documents that they did sign. They didn't ask them to do that. I can't imagine a clearer expression of the parties intent.

Having said that, your Honor, you asked me about the rules themselves. I do not agree with the Court's characterization that a —

THE COURT: Well, I'm just asking questions.

MR. FEDER: All right.

THE COURT: I wouldn't be presumptuous enough at this stage to characterize anything.

MR. FEDER: I would respectfully characterize the rules as not by any stretch stating that an employee or an officer of a member firm is a member. In fact, if you look at the rules carefully, the rules clearly distinguish between members and

associated persons of members, of member firms. And if you get to the rules at all, the rules themselves in Section 1 set up the general we call it the jurisdiction provision of the Exchange, it's entitled "Matters eligible for submission."

And in that provision it says that disputes between members are eligible for submission. It does not say but disputes between members and associated persons are eligible. The rules plainly recognize that there's a difference because it uses the term "associated persons" elsewhere in the rules. So I'd respectfully suggest that the rules, even if you look to them, do not apply here. Mr. Kaplan has not been a member since —

THE COURT: 1987, according to you.

MR. FEDER: 1987.

THE COURT: But isn't there something in there also about former members and people who were members at the time of the relevant conduct that's the subject of the dispute?

MR. FEDER: If I can paraphrase the commentaries that a former—a member who was—let me not paraphrase.

That for purposes of this rule the terms member, member organization and associated persons of a member shall be deemed to encompass those persons who were Exchange members at the time the circumstances occurred which gave rise to the controversy.

Before I address the language, the commentary doesn't apply here anyway because it's not a part of the rules that apply to this controversy, they are a part of an older set of rules which have been amended and even under the old rules, the commentary only applied to disputes between members and customers, not members and members.

But looking at the commentary, since the Court inquired, this dispute did not arise out of circumstances that occurred when Mr. Kaplan was a member. This dispute is over a breach of a workout agreement. The workout agreement was signed in March of '88, the breach allegedly occurred in May of 1989.

There clearly was evidence that was introduced that predated the workout agreement, but I'm sure your Honor recognizes that evidence is always introduced prior to the time the circumstances out of which an act or a cause of action arose, and so Mr. Kaplan's prior membership does not by any means make him a member for purposes of jurisdiction.

I think it's extremely important to remember that, if you do get to the rules at all, they plainly don't apply to Carol Kaplan. Carol Kaplan was never a member of the Exchange, never had anything to do with the Exchange. The parties agreement is the only possible source of jurisdiction.

THE COURT: And was not associated with MK?

MR. FEDER: And was not associated with MK, that's correct, sir. And there's no contention that there's any source of arbitration jurisdiction over Carol Kaplan other than the agreement, but the agreement speaks for itself and Mrs. Kaplan didn't sign the arbitration agreement.

THE COURT: Well, let me ask you a question. Maybe I should wait, but if we hold that there was no jurisdiction as to Mrs. Kaplan, I mean, aren't we just giving you snow in winter? I mean, what does that do for you really? I mean, if the tax refund is jointly both of theirs, you lose the same amount of money one way or the other, don't you?

MR. FEDER: Your Honor, I'm not familiar with the details of my clients' financing situation, but Mrs. Kaplan's money is separate and if Mr. Kaplan can't satisfy the judgment, then under the current order First Options could go after Mrs. Kaplan's money as well.

THE COURT: Well I don't —

MR. FEDER: Mrs. Kaplan is a separate individual.

THE COURT: I don't have the order in front of me, but are you saying they entered judgment—no, they didn't enter any judgment. Are you saying they found that she is liable for the whole $6 million?

MR. FEDER: No, sir, only for $345,000 tax refund.

THE COURT: Well, that's my—that's my recollection and that's my point and that's why I asked the question. In other words, if they had no jurisdiction, then you don't force the award against her for that limited amount of money.

MR. FEDER: Correct.

THE COURT: All right. But they would get it anyway, would they not, if the award were enforced against Mr. Kaplan and they also have an agreement to sue on which he signed? Do they not?

MR. FEDER: Oh, if what you're saying is they ultimately will—will win their lawsuit against Mrs. Kaplan in Common Pleas Court, I by no means concede that.

THE COURT: I don't know if —

MR. FEDER: I—you are correct, what they would have to do then is bring another proceeding against Mrs. Kaplan if they don't collect the full extent of the judgment from Mr. Kaplan, and I don't think your Honor wants to pre-judge the merits of that lawsuit.

THE COURT: Well, I'm just simply asking—well, go ahead, go ahead.

MR. FEDER: Mrs. Kaplan would have some very substantial defenses to that lawsuit. I could pick them off if you wanted, I doubt you're interested.

THE COURT: So your theory is that if Mr. Kaplan cannot satisfy the judgment or cannot satisfy it to within $300,000, then this could become relevant?

MR. FEDER: Then this could become relevant, yes, sir. Your Honor, $6 million is a lot of money.

THE COURT: Well, I guess it is; I've never been in a position to find out.

MR. FEDER: Your Honor, First Options contends in its brief that the Kaplans waived all of these objections to jurisdiction. First Options completely ignores Third Circuit precedent that says a waiver has to be clear, only a party who clearly forgoes his right to judicial review of a jurisdictional issue does waive it. And there is no evidence in the record of a clear and express waiver.

THE COURT: Well, maybe I didn't read all the cases you did. I don't recall anything about express waivers. I do recall reading something about a clear indication. I assume if the Court wanted to say express waiver, they knew how to say that, didn't they?

MR. FEDER: Your Honor, I'll —

THE COURT: Is there a difference between an express waiver and a clear indication?

MR. FEDER: Yes, sir, yes.

THE COURT: For example, may we not find a clear indication from one's conduct?

MR. FEDER: Yes. I think you can find something from conduct, but it's got to be pretty clear. Let me, if I could, just find the exact quote. It was either Pennsylvania Power or International Brotherhood, which we cited in our reply that was not cited in the First Options brief.

THE COURT: I am familiar with the case. I think you will find the words they use are clear indication.

MR. FEDER: A clear indication of an intent to forego judicial review, I think was the phrase.

Your Honor, the only evidence that First Options points to give the Court this clear indication of an intent to forego judicial review is counsel's decision to withdraw his objections from consideration at one preliminary conference. There is no way that that decision constitutes a decision to waive with prejudice. If the parties —

THE COURT: Well, I assume they also point to the fact that they participated in the arbitration and then —

MR. FEDER: Your Honor, I do think Pennsylvania Power and International Brotherhood are crystal clear that the decision to participate in an arbitration, having made an objection to the jurisdiction and having argued both jurisdiction and the merits absolutely does not waive the right to judicial review of that decision and in fact judicial determination of that jurisdictional question.

THE COURT: Well, I don't know, was York Air wrongly decided? Was Judge DuBois wrong and did the Circuit Court just mess up when they affirmed him?

MR. FEDER: I have no idea whey they affirmed him with that opinion. There is indication in there that there may have been a clear intent to waive; I don't have the full record from York Air. It is not clear from the opinion, but I do cite a couple of lines which give that indication.

THE COURT: Well, Judge DuBois found, quote, "York Air vigorously argued from the start that the panel did not have jurisdiction."

MR. FEDER: Your Honor, Judge DuBois relies on two Ninth Circuit cases which are in direct conflict with Pennsylvania Power and International Brotherhood.

THE COURT: And the Third Circuit missed that when they reviewed his opinion?

MR. FEDER: I do not agree with that characterization. The Third Circuit can affirm for any reason totally unrelated to what's—what's presented in that brief—in that opinion. I'm sure the Court has sat on the Court of Appeals, I clerked for the Court of Appeals.

THE COURT: Well, this is the only issue though, I mean, it's a short opinion, this was the only issue.

MR. FEDER: That—that's exactly what you don't know. You do not know why they found it. They may well have looked

to the actual jurisdiction issue and said there was jurisdiction, so we'll affirm with that opinion. They may have said—that would be most likely—I mean, that to me is the most likely decision.

I would respectfully ask the Court to read International Brotherhood and Pennsylvania Power carefully because I think there can be no doubt.

THE COURT: I have read them both, so —

MR. FEDER: Okay.

THE COURT: I have also read the more persuasive line of cases that hold to the contrary, but unfortunately they're from the Second Circuit.

MR. FEDER: Your Honor —

THE COURT: Not to mention the 9th, the 11th and just about every other circuit in the country.

MR. FEDER: I think I cite the First and the Seventh as being on—with the Third Circuit. I don't remember exactly which circuit.

THE COURT: Well, I don't know, I've looked at opinions from the Fourth Circuit, the 11th Circuit, the Second Circuit—well, not surprisingly, most of these opinions are either from the Second Circuit or the Southern District of New York cause that's where a lot of this comes up.

MR. FEDER: The First and the DC Circuit are definitely in agreement with this circuit, but with all respect, I think we're in Philadelphia.

THE COURT: Well, where we are is irrelevant; the question is what law applies. And I'm familiar with the cases, but I also am not 100 percent certain nor will I be till I re-read them a couple more times —

MR. FEDER: I would hope the Court would —

THE COURT: —exactly how—how they might or might not be read against what I consider to be very persuasive argu-

ments from Courts in New York that where one participates in a proceeding and only when an adverse award is entered does one start complaining about arbitrability and one might be somewhat skeptical, but go ahead.

MR. FEDER: All right. Your Honor, if the Court is at all inclined to revisit the Third Circuit precedent, I respectfully suggest that the Third Circuit reasoning makes perfect sense and the logic is that a contrary rule as set up in some of the other circuits but not the First and the DC Circuit.

THE COURT: Well, if you take a look at these opinions—and I don't really want to spend a lot of time on this right now—at least some of them come up in a slightly different context where everybody agrees that they agreed to arbitrate. And the question is did they agree to arbitrate a particular issue or type of issue and arguably different considerations and a different rationale might pertain, but why don't you get on with your argument?

MR. FEDER: Well, I recognize that distinction and I think that if that is the distinction, it only can help us because what we're talking about here is whether Mr. Kaplan ever agreed to allow these arbitrators to decide anything.

THE COURT: Yes, I —

MR. FEDER: Seems to me —

THE COURT: I un—

MR. FEDER: Seems to me those parties had agreed to submit something to arbitration so it wouldn't be so terrible if the arbitrators decided —

THE COURT: No —

MR. FEDER: —what they decide.

THE COURT: No, not at all. It would be a lot more logical for parties who agreed that they agreed to arbitrate a wide variety of issues to proceed and let the arbitrators initially determine whether one of the issues in dispute fell within those bounds without waiving their right later to claim it didn't than it

would be reasonable to expect a party who sincerely believed they had never agreed to arbitrate anything to nevertheless proceed to and through arbitration and then complain only after an adverse award was entered.

MR. FEDER: It's not them complaining only, we clearly presented the argument to the panel. It's not as if we thought of this after we lost.

THE COURT: Well, that's in dispute, but —

MR. FEDER: I—I recognize that.

THE COURT: —let me—let's just hear your argument. Go ahead.

MR. FEDER: With respect to that dispute, your Honor, if the parties who were there at the time felt that there was a clear intent to forego a waiver of the right to pursue a jurisdiction objection, one would think that First Options would have confirmed that fact in a letter, in a memorandum, in something at the time. Lawyers don't usually say: well, you waived it and we'll just trust you.

Likewise, when the panel ultimately denied our motion to dismiss, it's uncontested that Ms. Gavalis informed my co-counsel that—I'll try to get the language as precisely as I can without misstating it—she stated that the Exchange has always interpreted its rules to include people like Mr. Kaplan and she did not say anything about a waiver.

One would have thought that gratuitous comment wouldn't have been made if there really had been a concern about waiver.

Your Honor, jurisdiction is a threshold issue and obviously we don't feel you need to address anything beyond that, if you see it our way, but we have presented —

THE COURT: Well, there's two issues. Was there jurisdiction and if there wasn't, was there a waiver.

MR. FEDER: Yes, sir.

THE COURT: I mean, there's really two issues.

MR. FEDER: It's two threshold issues, I would agree with that.

We presented several other arguments obviously for why this award should be vacated. I'd like to highlight two of them for purposes of this argument.

Number one, this award was in manifest disregard of the parties' agreement and therefore of the law. Manny Kaplan was released unconditionally, unequivocally from personal liability for all acts that he may have performed preceding the workout agreement.

The language of the release is clear, it is unambiguous. The panel ignored it. The law is clear, First Options doesn't agree—doesn't disagree, and if the panel rewrites the parties' agreement, the panel ignores the —

THE COURT: Well, the award has to derive at least tangentially from the essence of the agreement.

MR. FEDER: Yes, sir.

THE COURT: I assume that's your argument.

MR. FEDER: Yes, sir. And where language in a contract, and in this case a release, is clear and unambiguous, the Court is free and in fact is required to revisit that question.

THE COURT: Can rewrite the terms of the agreement for the parties. This is —

MR. FEDER: The Court is required to make sure the panel did not rewrite the terms.

THE COURT: Well, the panel cannot do that, yes.

MR. FEDER: Yes, sir.

THE COURT: I understand.

MR. FEDER: If you compare the release of Mr. Kaplan with the release of the corporation, it's quite clear that the parties who had expressed a conditional release when they wanted to, the corporation's release begins upon termination of this agreement,

Mr. Kaplan's release doesn't say that. Mr. Kaplan's release was in effect upon the signing of the agreement and the panel's decision to ignore it was in disregard of that agreement.

Now, I'm not going to parse the language, the Court's going to, I'm sure, read it and decide for itself, but First Option contends—do I see a question coming?

THE COURT: No, I'm just eagerly awaiting—

MR. FEDER: I apologize.

THE COURT: —to hear what it is that First Options contends.

MR. FEDER: First Options contends that maybe the panel rescinded the release, rescinded the agreement and therefore could have ignored it because the whole workout had been rescinded. But it's quite clear from what happened that the panel enforced the agreement, the panel ordered Mr. and Mrs. Kaplan to pay over the tax refund. There is no source of that obligation other than the agreement itself, that can't be disputed, the panel plainly did enforce the agreement and therefore the panel is obligated to enforce the release.

It is also clear that given —

THE COURT: You're talking about the so-called workout agreement?

MR. FEDER: Yes, sir. Given the fact that Mr. Kaplan was released from liability prior from all—for all acts prior to the workout agreement, the only thing the panel could look to is anything that happened after the workout agreement.

Well, it's clear that after the workout agreement—we contend before, too, but we only need to focus on after—after the workout agreement, Mr. Kaplan and MKI were kept scrupulously separate. The only piece of evidence that First Options can point to that occurred after the signing of that release occurred also after Mr. Kaplan was kicked out of his office, after MK Investments was out of business, after MK Investments had closed out its checking account, Manny—First Options—MK Investments had

several thousand dollars which should have come to MK Investments, instead was directed directly to Mr. Kaplan.

THE COURT: I'm not sure I follow this. You mean in receivables or money that was cash on hand or —

MR. FEDER: Receivables, receivables. It is simply in manifest disregard of the law to conclude that those few thousand dollars alone turn the corporation MK Investments into a sham and allow the piercing of a corporate veil to the extent of a $6 million award.

Your Honor, I would like to talk about bias. The law's clear that the Court can infer bias from the proceedings, from the acts of the arbitrators. You don't need to actually find an arbitrator who gets up and says: Yes, I really didn't like Manny Kaplan.

THE COURT: Pretty strict standard though.

MR. FEDER: It is not something that courts do every day, but it's also clear that the Court has a higher obligation to look into this question because—because of the deference of the arbitrators. The Court does have an obligation to make sure that the arbitration process itself was fair. And if we don't have faith that the arbitration process itself was fair, then the deference —

THE COURT: Well, where's a requirement of fairness? I read the requirement in the act refers to evident partiality. I mean, what if the panel is unfair to everybody, what if they're just a bunch of ignoramuses?

MR. FEDER: I think that would also be grounds for refusal, for vacating, but not on the evident partiality strand, rather on the —

THE COURT: Well, we're on the partiality strand, are we not?

MR. FEDER: Yes, sir. And —

THE COURT: And partiality, at least according to the dictionary, I think, means partial to one side over the other, right?

MR. FEDER: That's correct, that is correct. And we believe that the series of 14 or 15 points that we've presented, when viewed collectively, can only be explained by partiality towards First Options.

THE COURT: But not individually. In other words, there's no one of them that standing alone, in your view, which would cause a reasonable person to be forced to conclude that there was partiality; I have to look at all of them, is that what you're saying?

MR. FEDER: I—I don't say that you have to, I think that makes it a lot easier for you. I think there probably are one or two which might stand out.

THE COURT: What are they?

MR. FEDER: I will certainly try to present what I think are the—are the clearest indications. Number one, the vacatur of the discovery award—discovery order. February of 1990 the arbitration committee held a discovery conference and issues an award—and issues a discovery order that's favorable to the Kaplans. Michael Waber (ph.) participates in that decision. First Options agrees—admits that it knew that Michael Waber was a friend and business associate of Mr. Kaplan at the time and it knew that Michael Waber was a member of the arbitration committee. And it also admits that it didn't object to his participation in that decision.

Two years later the panel sui sponte vacates that discovery order because Mr. Waber participated, even though First Options hadn't objected. First Options now tries to justify that decision solely by contending that they didn't know Mr. Waber actually participated in the particular decision, only that he was on the committee, even though First Options participated in the conference itself at which Mr. Waber participated.

There's nothing in the record to support First Options lack of knowledge and logic says they knew or should have known. The panel's decision to vacate, to vacate the previous award

without any prior objection struck us—and we hope it strikes you—as inexplicable other than evident partiality.

THE COURT: Maybe they thought they made a mistake?

MR. FEDER: It is stipulated by the parties that they, it's a new panel and the vacatur was because Michael Waber was a member of that panel without any review of the merits. They subsequently reviewed the merits and decided the decision against us, you are correct, but the vacation was done on the basis of Mr. Waber's participation.

THE COURT: Well, that I understand.

MR. FEDER: There was no—there was no looking at the merits at that point.

THE COURT: Well, I understand.

MR. FEDER: The fact that they made a mistake ultimately is how we suffered prejudice.

THE COURT: I'm talking about the subsequent decision that you don't like.

MR. FEDER: Oh.

THE COURT: Well, maybe I don't follow your argument. In other words —

MR. FEDER: That just shows we were prejudiced.

THE COURT: In other words, for partiality I should only look to the vacation of the original order. You don't suggest that the subsequent entry of the other order reflects partiality?

MR. FEDER: I don't think there's any evidence that I could present to you to suggest that.

THE COURT: Okay.

MR. FEDER: Number two, the Morgan Stanley tapes. First Options requested a tape recording of an arbitration proceeding, a confidential proceeding between Mr. Kaplan and Morgan Stanley.

Mr. Kaplan's counsel—the Kaplans' counsel objected to this request in writing and asked the Exchange to preclude Morgan Stanley from giving the tapes to First Options. The Exchange agreed with the Kaplans and denied First Options' request. A year later, without notifying the Kaplans, Morgan Stanley by its counsel asked the Exchange for the tapes and expressly says: we'd like to give it to First Options because we think it would be helpful in their case.

The Exchange, knowing that First Options—that the Kaplans have previously objected to this, knowing that the Kaplans are under the impression that their objection has been sustained, the Exchange turns around and gives the tapes to Morgan Stanley for the express purpose of giving it to First Options without telling the Kaplans about the request and without telling the Kaplans that they're giving over the tape.

That to us is inexplicable other than total insensitivity to the Kaplans' concerns and evident partiality.

Your Honor, the panel persistently refused to allow us to cross-examine First Options' witnesses adequately, two quick examples:

Scott Talento, their expert witness. The beginning of the hearing we made a statement on the record explaining our belief that Mr. Talento and First Options together had tampered with our expert witness.

First Options' counsel gave their version of whether that happened, you can look at the affidavit and the record, determine whether that happened, it's not material. What is material is the fact that Mr. Talento is the only witness who could provide any facts on this question. We asked him a couple of questions trying to look into his discussions with Mr. Spector, our expert witness, and the panel wouldn't let us. They weren't interested in the potential bias that this showed, they weren't interested in what this said about First Options' approach to the case. All they were interested in was hearing Scott Talento's direct examination but not our cross.

Number two, Gary Wendice. He reappears on rebuttal, two weeks after he had a chance to say exactly what he could have said two weeks ago, but after the Kaplans had finished their case. The panel decides to ask him questions on their own, but the panel asks precisely the same questions that First Options would have asked and then doesn't give the Kaplans a chance to poke holes in that story.

I can't conceive of any reason why they didn't allow us to cross-examine him at all on what everybody agreed was a pretty critical issue, other than bias.

The final point that I'll make on bias, unless you'd like to inquire of any others, your Honor, is their insensitivity to religious practice. The parties agree on the facts. Counsel for the Kaplans called up Ms. Gavalis, informed her that Mr. Kaplan regularly attends synagogue on Saturdays and requested that no hearing sessions be held on Saturday. And subsequently a similar request that no hearing sessions be held on Friday after 7:30 because he regularly attends synagogue on Friday evenings.

Ms. Gavalis responded the same way both times, after consulting with Exchange counsel: "No, if Mr. Kaplan wants to attend synagogue, his counsel can attend the hearing. He has the choice."

Your Honor, I submit to you that's not a choice.

THE COURT: Well, I'm not sure I follow you here. You're telling me that the insensitivity on the part of certain persons to the exercise of religion would show that they were partial, biased and prejudiced against the party on the merits of the dispute?

MR. FEDER: Yes, your honor, I do believe that what that shows is that there's no consideration for the Kaplans' needs. There's consideration for First Options.

THE COURT: Was there anything of record that would suggest that anyone associated with First Options asked for a continuance so that he or she could attend some religious service and they were treated differently?

MR. FEDER: No, your Honor, there is not.

THE COURT: All right, anything else?

MR. FEDER: Your Honor, I have nothing further, other than I do trust the Court will review our briefs pretty carefully and, if necessary, allow me a few minutes for rebuttal.

Thank you.

THE COURT: All right. Well, if necessary, we'll give you a few minutes to rebut, otherwise we might be accused of evident partiality.

Does First Options want to be heard at all?

MR. McDERMOTT: Your Honor, if I may, a short—I think this will be relatively brief. My name is Tim McDermott. I'm with Gardner, Carton & Douglas and I represent First Options. Here with me today is Walt Einhorn. Steve Bedell who was the -- is the partner on the case and the lead attorney could not be here. He had a previously scheduled hearing and I apologize for that.

I think what the Court needs to focus on in this situation is what our role is here in confirming arbitration award, vacating an arbitration award regarding points of bias or prejudice or evident partiality, the standard whether there was any prejudice to the parties as a result —

THE COURT: Well, let's start at the beginning because I confuse easily.

Isn't the first question you might want to address whether or not there was ever an agreement to arbitrate? Whether the—whether the award was entered in excess of any powers conferred upon the arbitrators, whether they acted with no jurisdiction?

Would that be a good place to begin before we get into what the test for partiality is?

MR. McDERMOTT: Sure. I think that it's clear the parties agree that there was jurisdiction over MK Investments. Regarding Mr. Kaplan, I think it's —

THE COURT: Well, it's my understanding that, based on all your submissions, MK is effectively defunct, is it not?

MR. FEDER: Yes, your Honor.

THE COURT: And I assume MK does not supply a source for recovery for you or you wouldn't be worried about the Kaplans, is that right?

MR. McDERMOTT: That is correct, sir. The dispute regarding Mr. Kaplan and Mrs. Kaplan involves two main points really: one, that Mr. Kaplan was a member of the Exchange, as that term is interpreted and defined under the Exchange rules and also the United States Code.

THE COURT: You lost me on the last curve. Somewhere in the United States Code which contains 50-some volumes I'm going to find a definition of member of the Philadelphia Stock Exchange?

MR. McDERMOTT: There are definitions of what associated persons are. The cites are provided in our brief. I —

THE COURT: You just don't recall the cite?

MR. McDERMOTT: Offhand I do not recall the cite.

THE COURT: All right.

MR. McDERMOTT: The status of Mr. Kaplan as the director, officer and sole shareholder of MKI renders him an associated person and a member of the Exchange. Under the rules of the Exchange as they've been interpreted by the courts, the rules constitute a contract between the Exchange and its members and provide where the rules provide for arbitration, the members are bound to arbitrate.

THE COURT: Well, is it—it's uncontested, isn't it, that he was not a member of the Exchange after sometime in the spring of '87, was it?

MR. McDERMOTT: After I believe December of 1987—

THE COURT: Okay, the fall of '87, all right.

MR. McDERMOTT: He was no longer personally a quote, unquote, "member of the Exchange."

THE COURT: But under your theory he was still a member because of his association with MK?

MR. McDERMOTT: Correct. In addition, before December of 1987 the part of—part of what constitutes the basis of this arbitration award and that is the crash in October of 1987, the deficit incurred in October of 1987, certain conduct which happened at that time, representations, what we contend were misrepresentations made by Mr. Kaplan and his counsel to First Options and the negotiation of the March 24, 1988 workout agreement, all those activities predated the termination of Mr. Kaplan's status as a member of the Exchange in his individual capacity.

In addition, after that date he continued to be a member as interpreted by the rules. Also—and this goes to Mrs. Kaplan as well—in the workout agreement executed on March 24, 1988, the parties agreed to arbitrate.

I understand that there were separate documents, certain documents were signed by certain parties, but our contention is that the documents, the individual documents which made up the workout agreement were executed at the same time for the same purpose and according to the law we provided the court in our brief, they constitute essentially a single agreement. And the arbitration clause in the subordinate loan agreement —

THE COURT: Yeah, it refers to all of them, doesn't it?

MR. McDERMOTT: Yes, incorporates the letter agreement which was signed by Mr. and Mrs. Kaplan and we believe that that provides a separate and additional basis for arbitrable jurisdiction.

In addition —

THE COURT: You're talking about the agreement regarding the tax refund?

MR. McDERMOTT: I'm sorry?

THE COURT: I'm sorry. You're talking about the agreement regarding the tax refund?

MR. McDERMOTT: Yes, the letter agreement has a provision for the tax refund which is—and the letter agreement is one part of the, what the—what is referred to as the workout agreement. The subordinated loan agreement which was signed by MK Investments but which refers to the letter agreement included the arbitration clause.

In addition, in that—that provides a basis for jurisdiction over Mrs. Kaplan and Mr. Kaplan as well. In addition, after the action was filed and Mr. and Mrs. Kaplan withdrew their jurisdictional objections, we contend that that constitutes a submission to the jurisdiction of the Exchange.

THE COURT: Even if they were later reasserted?

MR. McDERMOTT: Well, I think once submitted, always submitted. It's —

THE COURT: You're losing me on the curve here. In other words, if somebody files a motion, say in a court case in Federal District Court, saying, you know, we move to dismiss, we don't think there's any personal jurisdiction and they then say: you know, we're going to withdraw that motion. But then they re-file it a month later, they're not allowed to do that? If they get a new lawyer they're not allowed to re-file it?

MR. McDERMOTT: I think that the difference is, your Honor, the concept of arbitrable jurisdiction and a Court's jurisdiction. If the Court—if a Court lacks jurisdiction over a particular matter, there's not a whole lot the parties can do —

THE COURT: I'm not talking about subject matter jurisdiction, I'm talking about in personam jurisdiction. Well, let's make it easy: they objected to jurisdiction, they withdrew their

objection, they got a new lawyer and he reasserted that objection, isn't that what happened?

And I want to make certain I understand your argument about why I should disregard the reassertion of the objection.

MR. McDERMOTT: Well, I—the fact that the objection was withdrawn and then approximately two years later was --

THE COURT: Yes, but before anything had happened except for one conference of some kind.

MR. McDERMOTT: There wasn't —

THE COURT: I think your adversary would agree that if you object to jurisdiction, withdraw it and then reassert it only after the conclusion of all the proceedings, it might not be very viable. But if I understand the record—and you've agreed to it—they reasserted an objection to jurisdiction before anything substantive happened.

I understand a long period of time elapsed, but from what I could ascertain, nothing happened during that period except some conference or other.

MR. McDERMOTT: There was—the objection was withdrawn in the beginning of a conference and they thereafter participated in the conference.

THE COURT: Right. And nothing else ever happened again, if I under-- of substance before they got a new lawyer who asserted or reasserted the objection, isn't that correct?

MR. McDERMOTT: It is correct that nothing, nothing substantive happened --

THE COURT: Right.

MR. McDERMOTT: —before the arbitration committee or the arbitration panel, that is correct.

THE COURT: Well, why then should I disregard the reassertion of the objection?

MR. McDERMOTT: Well, I think that the—and I'm not asking you to disregard the assertion of the objection as much as I'm asking you to concentrate on the withdrawal of the objection and I think that that withdrawal of their objection to jurisdiction was a clear indication that they were submitting to the jurisdiction of the Exchange.

THE COURT: Well, just humor me for a minute. What was the reassertion of the objection an indication of?

MR. McDERMOTT: I think it was an indication that they had changed their minds, but I don't —

THE COURT: Are they allowed to change their minds?

MR. McDERMOTT: I think they are allowed to change their minds, but that doesn't mean that they can unsubmit themselves to jurisdiction. Once a party agrees to arbitrate a dispute, that party is bound to arbitrate the dispute. And where a party —

THE COURT: Well, we've come full circle. You're telling me I should give no weight to the reassertion of the objection.

MR. McDERMOTT: I think that the reassertion of the objection, when you start looking at that, you then look at the decision that the panel reached in regards to that reassertion of the objection and what the panel did was to deny their objections to jurisdiction at that point.

Now, we don't know exactly what basis, exactly upon what basis they made that decision, but it is certainly a reasonable conclusion to assume that they considered the objection had been waived. And —

THE COURT: You really lost me on that curve. I'm supposed to infer from the denial of the second objection that they found that the—I'm sorry—the Kaplans had waived their jurisdictional objection?

MR. McDERMOTT: That they —

THE COURT: Isn't it possible that —

MR. McDERMOTT: Yes.

THE COURT: Isn't it equally possible they found jurisdiction because they bought your other arguments?

MR. McDERMOTT: Yes.

THE COURT: They said oh, look at this, we think we have jurisdiction.

MR. McDERMOTT: It's entirely possible.

THE COURT: Look at the agreement, look at the arbitration clause, he's a member, we have jurisdiction.

MR. McDERMOTT: Yes.

THE COURT: Isn't it equally as possible that was a basis for their decision?

MR. McDERMOTT: Yes, that is—that is equally possible and I think that that's—that's an important point in looking at what we're here to do today and that is not to, if the arbitrators had—if there is a plausible explanation for the decisions that the arbitrators reached, then that decision should be upheld.

THE COURT: You're losing me on the curve completely now. If there was an objection to jurisdiction, and if there was not a waiver of the right to judicial review on that point, then would it not be fair to say that the standard of review would be somewhat broader than the standard of review would be if there had been no waiver?

MR. McDERMOTT: I —

THE COURT: I mean then you get into Judge DuBois' analysis —

MR. McDERMOTT: Right, the cases —

THE COURT: —where then you treat it the same as any other issue.

MR. McDERMOTT: A manifest disregard —

THE COURT: In other words, unless they were completely off the wall, then you affirm them.

MR. McDERMOTT: Right, a manifest disregard of the law standard and that's my point, your Honor, is that there are a mult— there are a number of bases upon which they could have legitimately denied that jurisdictional—those jurisdictional objections when they were raised again.

THE COURT: I understand, but maybe I'm failing to be sufficiently cogent. The question is did the Kaplans waive their objection to jurisdiction? If they did, we may go down one path in terms of the scope of review. If they didn't, then you have a much broader scope of review, is that correct? So the question --

MR. McDERMOTT: Yes.

THE COURT: —the question is did they waive? Now, they objected and they withdrew the objection and I'm having a hard time understanding what you contend the significance, if any, was of their reassertion of a jurisdictional objection before any substantive proceedings on the merits transpired.

MR. McDERMOTT: Let me—let me try to break it down into steps. I think that once they withdrew the jurisdictional objection, the Kaplans thereby submitted themselves completely to the arbitration of this matter before the panel.

Thereafter they participated —

THE COURT: Well, stop there. Is that your way of telling me that once you consent, you cannot unconsent? I just—

MR. McDERMOTT: I think yes.

THE COURT: I mean, I'm not really trying to trick you, but I am desperately trying to understand your argument and having a very hard time understanding it. I mean, I'm not—there's at least three different things you may be telling me and I can't quite figure out what they are.

I mean, did I completely disregard the reassertion of the objection because you can't reassert an objection once it's withdrawn? Or it does have some significance, but you can't quite tell me what the significance is and why it's outweighed by something else? I just don't really understand.

MR. McDERMOTT: I think my problem is, your Honor, that I'm arguing two points in the alternative and I'm not separating them sufficiently.

My first point is that the withdrawal of the objection was a full and complete submission to the arbitration of the Exchange, a waiver, a complete waiver of their ability to contest the jurisdiction of the Exchange, given their clear indication of submission to the Exchange's jurisdiction.

Now —

THE COURT: Do you any authority for the proposition that before they actually proceed to arbitration, they have no legal right to change their mind and reassert their jurisdictional objection.

MR. McDERMOTT: I am not aware of whether we cited a case in our brief.

THE COURT: Well, it doesn't have to be in your brief, are you aware of any authority anywhere? You can give it to me right now.

MR. McDERMOTT: Well, if I cited in my brief, I can look it up an give it to you.

The best, the best I can tell you is I believe I have seen cases to that effect, but obviously I'm not—I just don't have them.

THE COURT: Just don't recall where you saw them?

MR. McDERMOTT: Right.

THE COURT: Well, again, at the risk of being redundant, I'm going to try one last time: what significance, if any, are you asking me to give to the subsequent reassertion of the jurisdictional exemption? Are you telling me disregard it, it's null and void, once they withdraw their objection they had absolutely no right to reassert it? Or are you telling me that based on their

conduct and the whole record and other things, I can find waiver even if I do attach some weight to the subsequent reassertion? Which of these things are you telling me or are you telling me some other thing?

MR. McDERMOTT: I think, your Honor, I'm telling you both in the alternative and I think that that's—I think what it comes down to is —

THE COURT: Well, fine, if that's your answer, then tell me what else I should look at in determining that despite a reassertion of the jurisdictional objection, they nevertheless waived it. What should I look at to agree with you on that point?

MR. McDERMOTT: The parties' conduct in —

THE COURT: Let me have it; what conduct?

MR. McDERMOTT: The waiver of the objections, the participation in the hearing. I—what happens is after you get past the waiver and the participation in the hearing, their reassertion of objections to jurisdiction are not meaningful in any sense.

THE COURT: But I thought we all agreed they participated in the hearing only after they renewed their jurisdictional objection?

MR. McDERMOTT: No, no. There was a—there was a pre-hearing conference scheduled in February of 1990.

THE COURT: Right.

MR. McDERMOTT: That hearing was—at that hearing, at the beginning of that hearing —

THE COURT: That's when they withdrew their original objection. That was reasserted before there were any proceedings, wasn't it?

MR. McDERMOTT: There was a proceeding following that withdrawal of the jurisdictional objections.

THE COURT: Well —

MR. McDERMOTT: That day.

THE COURT: Yeah, I understand, it was a pre-hearing conference and I'm not sure what that means, but before proceeding to arbitration, before actually proceeding they renewed their objection, didn't they? Now, what did they do therewith or thereafter that would evidence nonetheless a waiver of their jurisdictional objection or wavier of their right to pursue it through judicial review?

MR. McDERMOTT: Well, at least as regards Mr. Kaplan, he had filed counterclaim in the action. That was filed—this was filed before the pre-hearing, the original pre-hearing conference that we're talking about, but nonetheless I think that's a clear indication that he is submitting himself to the jurisdiction of the arbitration panel in that he's seeking relief from the exact same panel in which he objects—to which he objects on a jurisdictional basis.

THE COURT: Anything else? Not that that may not be pretty good, but anything else?

MR. McDERMOTT: Up to that point, I think that's—those are, I think, big points.

THE COURT: And he did not withdraw the counterclaim after the objection was reasserted, did he?

MR. McDERMOTT: No, the counterclaim was never withdrawn and he proceeded to the hearing on the counterclaim.

THE COURT: Okay, anything else?

MR. McDERMOTT: I—I'd just like to touch on some of the points that Mr. Feder raised. Again just to point out some of the distinctions between the cases cited by Mr. Feder and the situation we have here, in Pennsylvania Power, the affiant (ph.) in that case —

THE COURT: I'm sorry, the what in that case?

MR. McDERMOTT: Affiant (ph.).

THE COURT: Oh.

MR. McDERMOTT: Consistently maintained throughout the hearing the—its position that the matter was not arbitrable, that that is clearly not the case in this situation.

In the Local 719 case cited, when the party—when the union submitted to the jurisdiction or submitted the issue of arbitrability to the arbitrators, they expressly stated that they were not waiving at that time—and this was at the beginning of the proceedings—they expressly stated that they were not waiving their right to seek further judicial review of this matter.

Again, that's not what happened here.

THE COURT: Well, wait a minute. The Kaplans here expressly voiced an objection to jurisdiction, didn't they?

MR. McDERMOTT: And then submitted that objection to the arbitrators to decide.

THE COURT: Well, the same thing in the Penn Gas case, they submitted the issue to the arbitrators, but they didn't waive the right to judicial review, at least that's what Judge Staple found, didn't he?

MR. McDERMOTT: I think that when you look at all the factors in this case, they sufficiently distinguish the cases cited by Mr. Feder. I don't think that this is a situation where the Third Circuit is so far away from the Second Circuit and other circuits. In fact, I think that much of the reasoning in the cases cited in their reply brief is sound law and consistent with many other circuits.

I think that simply the facts of this case distinguish those cases and make, for example, York Air a more applicable case.

THE COURT: Well, I don't know. They do say you need a clear indication, do they not?

MR. McDERMOTT: The —

THE COURT: Of a willingness to waive or forego judicial review.

MR. McDERMOTT: That is correct. And my argument in that regard would be that in this case we had a clear indication through the initial waiver of the —

THE COURT: All right, your argument is that where it's ambiguous and confusing, it doesn't necessarily satisfy the clear indication test, is that your position? Would you not acknowledge that it's at least somewhat ambiguous here what they intended to do?

MR. McDERMOTT: Certainly.

If I could, I'd like to go on to the arguments which concern the release language and whether there was a manifest disregard of law or of the contractual agreement.

The language in the release clause included a clause at the end of the paragraph, provided however if Mr. Kaplan doesn't —

THE COURT: I'm sorry, I'm just having trouble hearing you. If Mr. Kaplan doesn't what with some form?

MR. McDERMOTT: There was language at the end of the release paragraph concerning Mr. Kaplan.

THE COURT: You're talking about the release of prior liability? I'm not sure I understand what document you're talking about.

MR. McDERMOTT: In the workout agreement —

THE COURT: Oh.

MR. McDERMOTT: —there was a release —

THE COURT: From prior liability.

MR. McDERMOTT: Yes.

THE COURT: Yes.

MR. McDERMOTT: With a "provided however" clause which required him to perform under the agreement. The panel heard testimony offered from both sides as to what the release language meant. They considered, they were provided with and

considered various drafts of the agreement and again I think it's important to remember that this is a factual determination regarding what the parties agreement was which the arbitrators reached a resolution about.

Now, it is—it is unclear, since arbitrators don't provide written reasons with their awards, exactly what they based their decision on, but —

THE COURT: It doesn't matter what they based their decision on, does it? If I find there was no waiver, then I have to actually find there was jurisdiction, do I not?

MR. McDERMOTT: I'm sorry, if you find that there was no waiver?

THE COURT: Then I'd have to find there was actually jurisdiction, I have to find that you all agreed to arbitrate, don't I?

MR. McDERMOTT: Yes.

THE COURT: So it doesn't matter what reason the arbitrators appear to find they had jurisdiction without ever explicating it, I have to find they had jurisdiction, don't I?

MR. McDERMOTT: You—no, and, well, yes —

THE COURT: I don't?

MR. McDERMOTT: But what you have to find is that there is some basis in the record for the decision that the arbitrators reached. We don't necessarily—it doesn't—we don't necessarily —

THE COURT: Well, you're really losing me on the curve here. Your position is that when you go to arbitration, one of the parties says we object, we don't think there's an agreement to arbitrate, we don't think this is arbitrable, but in the first instance without waiving any rights, all right, you take a look at it, perhaps thinking you're bound to agree with us and we'll get this over with in a hurry.

Then they don't agree and they say: We find we have jurisdiction. They never tell you why, they just say we find it.

Your position is: I don't have to find whether or not they really had jurisdiction, I don't have to find whether the party really agreed to arbitrate, as long as they conceivably did, is that what you're telling me?

MR. McDERMOTT: No, no, it's not. And what I—I perhaps didn't speak as clearly as I should have--you are correct that you have to find a basis for the result reached by the arbitrators.

THE COURT: Don't I have to find that the parties agreed to arbitrate the dispute? And only then that we take a look at whether there is some probable basis in fact and law for the decision they reached on the merits?

MR. McDERMOTT: Yes. When I say the result that they reached, I include as part of that result the determination on the fact that there is some jurisdiction and simply you have to find a basis for the award that they reach and that includes jurisdiction.

THE COURT: Well, we've come full circle here. What if they have it waived? Generally, it's up to the courts to decide, it is not, whether a matter falls within the jurisdiction of an arbitrator?

MR. McDERMOTT: At first blush, yes, unless there is, unless there is some conduct—well —

THE COURT: There's only one exception, isn't there?

MR. McDERMOTT: Well, the parties can agree to submit the issue to the arbitrators.

THE COURT: Right, right. But what if—my question for you which I'm sure it's my fault for not being able to articulate well, that supposing I find that like in some of the circumstances described in some of the Third Circuit cases we have alluded to, they said hey, we contest jurisdiction, we don't think this dispute is arbitrable. Now, without waiving any rights and without agreeing to forego ultimate judicial resolution or at least we're not going to clearly indicate that we're waiving, go ahead, we'll let you take a crack at it. And the arbitrators come back and say

well, jurisdiction, and they proceed to adjudicate the merits, just what happened in two of these five Third Circuit cases, isn't it? You're telling me that when it gets to me, all I do is look to see whether there's any colorable basis at all for their finding that they had jurisdiction? Or do I actually have to find that they did have jurisdiction?

MR. McDERMOTT: I believe —

THE COURT: Or aren't you sure?

MR. McDERMOTT: I believe that it is the former, there is—there is a colorable basis for the Court, for the arbitrators finding they had jurisdiction when the parties had submitted that question.

THE COURT: No question about it because that's then the test you apply to every finding. My question is they haven't agreed, they've objected, they have filed a motion,n they've said there's no jurisdiction, this is not arbitrable, we never agreed to arbitrate, but then as apparently happened in at least two of these cases the Third Circuit got, they go ahead without waiver and they let the arbitrators find jurisdiction and enter an award.

What I'm reaching for is what's the test then, is it still any colorable basis or do I actually have to find there was jurisdiction?

MR. McDERMOTT: Well, I think there is some disagreement in courts as to what the standard is to be applied, but I think that there is—and I believe it was the International Brotherhood case where the Court would—the Court indicated that they would have to clearly perceive that the arbitrators lacked authority or lacked jurisdiction in order to conclude that or in order to vacate the arbitration award. And I think that the language they used indicates that it is a higher standard than simply reweighing the evidence de novo. I think that it is a—it is a higher —

THE COURT: Even where a party has objected to jurisdiction and not waived that objection?

MR. McDERMOTT: If the party from the start submits the question of arbitrability to the arbitrators but at that time says

I retain the ability to seek judicial review of this determination, in that situation I think that there should be a de novo review in the Court and in fact that was the Local 719 case.

THE COURT: Right.

MR. McDERMOTT: I do not think that the situation which we have here where the parties did not consistently maintain their objection, they subsequently —

THE COURT: So it turns on the facts as we find them, doesn't it? It turns on whether or not they preserved their right or failed to waive the right or however you characterize it to see judicial resolution, isn't that—on this issue? Isn't that what it comes down to? That will determine what the scope of review is, won't it?

MR. McDERMOTT: Yes.

THE COURT: So assuming, just maybe I get to the question of is there jurisdiction, what am I supposed to look at? I'm supposed to look at the arbitration provision and the workout agreement, anything else? The fact that Mr. Kaplan is a, quote, "member"?

MR. McDERMOTT: The Exchange rules.

THE COURT: Within the meaning of the definition of the rules. Anything else?

MR. McDERMOTT: Well, I do think that the—the withdrawal of the objections themselves constitutes a separate submission, but yes, the agreement and the Exchange rules, I think, provide the basis in this case.

THE COURT: Okay, anything else?

MR. McDERMOTT: At least in terms of jurisdiction I think that sums up.

THE COURT: Any other points you wish to address?

MR. McDERMOTT: I would like to briefly address some of the point raised at this time about the questions of bias.

The—regarding the vacatur of a discovery order, the one thing which was quite clear from Mr. Feder's discussion of this issue I think was that First Options did not know at the time of the first pre-hearing conference that Mr. Waber was participating on the committee that was actually hearing the dispute, as the affidavits which we've submitted indicate it was in December of 1991 that First Options found out about this participation.

Regarding the —

THE COURT: You knew he was on some other committee? I guess I —

MR. McDERMOTT: No, he was on the arbitration committee. The arbitration committee in toto does not necessarily sit in each instance, they meet in fact according to the rules, they simply have to meet by quorum. And so —

THE COURT: Say that again?

MR. McDERMOTT: According to the rules then in existence, they had to meet by a quorum.

THE COURT: Well, you knew—was he one of the seven people?

MR. McDERMOTT: At the time there was an arbitration committee which was a different situation than we had under the new rules which established arbitration panels. Under the old rules the arbitration committee, which was a larger group of people —

THE COURT: How many?

MR. McDERMOTT: I believe it was 20. The —

THE COURT: In other words, saying what? You have a committee of 20 people, they don't hear all disputes, they pick three or five or seven of them to hear a dispute, is that what you're saying?

MR. McDERMOTT: No, it's not, they simply have to, it's like any large committee, to conduct business they have to have a quorum there and they're not—they weren't assigned panels

to hear a dispute, they simply had to have a quorum of the committee to conduct one.

THE COURT: So 20 people would hear a dispute?

MR. McDERMOTT: That was why they got new rules.

THE COURT: Any they could not proceed unless what, 11 or more were present?

MR. McDERMOTT: I don't mean to represent to the Court that I know the exact number of people, it was a larger number than the seven-person panels that we have assigned to the case.

THE COURT: Well, did a quorum require at least a numerical majority?

MR. McDERMOTT: Yes.

THE COURT: So you needed at least 11 people, is that right?

MR. McDERMOTT: Right.

THE COURT: But they didn't have to be the same 11 people? This is how they ran their arbitration program?

MR. McDERMOTT: That's my understanding.

THE COURT: So we had five days of testimony. Different people may hear different testimony each day? I'm on the committee, I can make it Monday and Wednesday, but not Tuesday, Thursday and Friday. So I know whatever the testimony was on Monday and Wednesday, but not Tuesday, Thursday and Friday? This is how they ran their arbitration program?

MR. McDERMOTT: In terms of individual hearings, hearings regarding a particular matter, I have to confess, your Honor, I don't know about the rules as to how they used to run the system, but my understanding was on that particular day for the hearing it was uncertain as to whom for the committee would actually be on the panel or on the—sitting on the committee —

THE COURT: Well, the reason I'm asking how it worked is because it at least appears that you at least knew that Mr. Weber or Waber or however he pronounces his name, well, could have been one of the people, since apparently this was a committee of the whole and as long as 11 or more people showed up, it was off to the races?

MR. McDERMOTT: I think that's true. I mean, it is, it was conceivable that he could have sat on the committee, although one would also presume, I think, that he would have rescued himself from the matter, given his relationship with one of the parties?

THE COURT: But you later learned he didn't?

MR. McDERMOTT: Excuse me?

THE COURT: You later learned he did not?

MR. McDERMOTT: Correct, in December of 1991.

THE COURT: So if it's a committee of 20, if it takes a minimum of 11 people and that means it takes a minimum of 6 people to make a decision, Mr. Waber would have been a powerful advocate to get them to enter [illegible] appeared shortly thereafter to be clearly erroneous [illegible] you agree with that?

MR. McDERMOTT: I don't know what kind of any advocate Mr. Waber was and in fact I don't know that he would have had to have them render a decision that was clearly erroneous. The arbitration panel wasn't under a clearly erroneous standard reversing the earlier decision and in any event the issue here is not whether the decision which the arbitration panel made vacating that earlier order was clearly erroneous or erroneous at all. The issue is whether —

THE COURT: Well, maybe I was being a little hyperbolic, but why don't you go on and continue with the prejudice argument or the partiality argument?

MR. McDERMOTT: Okay. And again I'd just like to point out there with all of these issues, the question is whether they prejudiced the petitioners.

THE COURT: Well, where do I find that standard?

MR. McDERMOTT: I believe that that's the standard in determining —

THE COURT: It's not in the act, is it?

MR. McDERMOTT: It's in the case law and should be in the act.

THE COURT: Where, under the second criteria?

MR. McDERMOTT: Under the—oh, the bias?

THE COURT: Are you sure if I find evident partiality I then have to find actual prejudice, are you sure? Or is it possible that I don't?

Well, go ahead, consult with co-counsel, maybe he'll have some light to shed on it.

MR. McDERMOTT: I believe that if the order resulting from the arbitration proceeding—if the parties were not prejudiced by the decisions made by the panel which are raised in these 14 points, then the award should be affirmed. If you do find —

THE COURT: Well, let's take the other half of No. 2. If I found that the arbitrators were clearly corrupt, I should go ahead and affirm the award, according to you, as long as there was no actual prejudice, right?

MR. McDERMOTT: That's the point I was about to make, Judge. If the individual decisions that they made did not cause prejudice then—or did not cause prejudice to them, then the award has to be confirmed.

If you find evident partiality on the part of the arbitrators, that is, under the act, the basis for vacating the award.

THE COURT: Without regard to prejudice, right?

MR. McDERMOTT: That—in regards to the prejudice part of the two points, yes.

THE COURT: Well, humor me. I thought we were talking about evident partiality, isn't that what—weren't we under that portion of the argument?

MR. McDERMOTT: Yes, and —

THE COURT: Well, help me out here. Is it your position I have to find actual prejudice plus evident partiality or just evident partiality?

MR. McDERMOTT: I believe that the standard is that ...

(Pause.)

THE COURT: Well, go ahead. I don't want to wait while you read through things. I thought maybe you'd have an answer off the top of your head.

Okay, anything else?

MR. McDERMOTT: To answer the question, I think you have to find a reasonable impression of partiality.

The other —

THE COURT: Assuming that the test is evident partiality, period, would you agree that looking at all these 14 things a reasonable person would be forced to conclude that the arbitrators were impartial or partial? Excuse me, partial. Humor me for the moment, let's assume you don't need prejudice, let's assume you just need evident partiality. My question is would you agree that taking the 14 points the Kaplans complained about together —

MR. McDERMOTT: Mm-hmm.

THE COURT: —a reasonable person would be forced to conclude that the arbitrators had been partial?

MR. McDERMOTT: Well, I think it's—I think that the taking all, even taking all 14 points together that they don't indicate any partiality on the part of the arbitrators.

THE COURT: Do you have any argument to make on that point at all? You don't have to.

MR. McDERMOTT: Well, I think if you go through each individual point you see that it becomes clear that most of the allegations of prejudice —

THE COURT: No, these are allegations of partiality.

MR. McDERMOTT: Most of the allegations of partiality, if you look at what is being alleged to have occurred in context of what happened, it just doesn't—that most of these individual instances don't indicate partiality in any respect.

THE COURT: Do any of them?

MR. McDERMOTT: I don't think so.

THE COURT: Okay, anything else?

MR. McDERMOTT: I would just like to refer you again to the discussions in the parties' briefs as to each of those points and I think that that does a fairly good job of pointing out how there is no prejudice as to each of those or partiality as to each of those points.

THE COURT: Well, they say that these arbitrators wouldn't even let them cross-examine one of your key witnesses. That's unusual, isn't it?

MR. McDERMOTT: The only witness they were not allowed to cross-examine was Gary Wendice on his rebuttal testimony. He had in fact been cross-examined earlier on his testimony during First Options' case in chief. They didn't, he was not allowed cross-examination, they were not allowed cross-examination on the rebuttal testimony, but then neither was First Options allowed direct examination on rebuttal, rather the arbitrators decided at that point what they were seeking and asked the questions and I don't think either party, I don't think the procedure that they picked in not allowing either party to question him evidences any partiality on their part.

THE COURT: I thought they wouldn't let them, they say that they wouldn't let them cross-examine one of your key witnesses, an expert witness or something?

MR. McDERMOTT: They—they attempted to question —

THE COURT: They cut them off after two questions or something?

MR. McDERMOTT: They attempted to question Scott Talento regarding an issue of—regarding the Seymour Spector issue, Seymour Spector was the witness, the expert witness which the petitioners had subpoenaed to appear at the hearing, at the beginning of the hearing the parties presented their arguments as to the propriety of that subpoena. Before the arbitrators ruled on the propriety of the subpoena, the subpoena was—the petitioners withdrew Mr. Spector as a witness and when Mr. Talento was testifying—

THE COURT: I mean, I assume, I've got to read between the lines, but I assume they wanted to adduce evidence that somebody had leaned on Mr. Spector to get him to withdraw his favorable testimony and that that's why they weren't able to call him.

MR. McDERMOTT: Well, the point is that they had withdrawn Mr. Spector as a witness. They wanted to attempt to enforce the subpoena and have him testify, they could have done that.

THE COURT: I think their position is they didn't want to because after agreeing to give favorable testimony, somebody leaned on him and got him to back off. But they thought maybe establishing that fact could be material in some way. That's my impression, but maybe I'm reading too much between the lines.

Anything else?

MR. McDERMOTT: I've got one last point which was one of the points raised by Mr. Feder regarding insensitivity to Mr. Kaplan's religious practices, I would just like to point out that the hearing had been originally scheduled in 1991, had been rescheduled on numerous occasions and it was only, and on each of those occasions both Friday and Saturday hearings had been scheduled. It was only after it was again finally scheduled for the

May hearing that the point was raised regarding a limitation of that Friday.

THE COURT: Well, I'm not sure I follow. You're saying that they attempted to schedule a hearing on a number of occasions?

MR. McDERMOTT: That the hearing had been originally scheduled, I believe, in fall of 1991 for specific dates. It was then continued to December of '91—no, I'm sorry—it was continued to January of '92 and then February of '92 and then April and May and there were Friday and Saturday hearings scheduled on all of those instances and it was—the point was never raised as to whether Friday or Saturday hearings needed to be restricted in any way until it was first raised when a hearing had been scheduled for April.

THE COURT: Is that unusual for the arbitrators to meet on Friday and Saturday?

MR. McDERMOTT: That's not my understanding. In fact, I think it's rather normal, the arbitrators —

THE COURT: Cause they like to work and make a living Monday through Friday, right?

MR. McDERMOTT: Exactly. And in addition to the, well, I just think the point is that the issue wasn't raised until they got into a final hearing date and at that point I think it was eminently reasonable for the Exchange not to again switch the dates. If your Honor has any questions regarding any other specific points, I'd be happy to address them, but I think that the briefs do an adequate job of addressing every point that's been raised.

THE COURT: Okay. We'll take it under advisement.

MR. FEDER: Your Honor, with trepidation, one factual point, not a rebuttal argument.

There is nothing in the record regarding how many members of the full arbitration committee there are, my understanding it's 11 and there's nothing in the record.

THE COURT: Oh, I see. Well, I guess that's my fault for asking too many questions. I just thought it would be interesting to try to figure out what I might be able to look at in trying to determine whether First Options should or should not have known that Mr. Waber may have been a party to the ruling that was later vacated. I'm not sure it's all that pertinent.

All right, is there anything else at all? Okay.

Do you agree with Mr. Bedell that it's not good enough if I find partiality; I have to find that it actually prejudiced your client?

MR. FEDER: Your Honor, I rarely agree with Mr. Bedell. Mr. McDermott is my opposing counsel today.

THE COURT: Oh, I'm sorry.

MR. FEDER: I occasionally agree with him.

THE COURT: I'm sorry.

MR. FEDER: And I do not agree, no. I know of no case that says that.

THE COURT: And I guess the other question I would ask you, just so the record is clear, everybody got their chance, do you agree that in determining whether or not the arbitrators in this case had jurisdiction I have to defer to them if there was any colorable basis on which they could find they had jurisdiction that ends the inquiry?

MR. FEDER: No, sir, I believe you have that obligation to review that question de novo.

THE COURT: Unless it was submitted and waived, correct?

MR. FEDER: If it was submitted and waived, then you would review it on a deferential basis.

THE COURT: Like you would any other finding, right?

MR. FEDER: Yes, sir.

THE COURT: All right. Well, my apologies to Mr. McDermott for giving him a misnomer.

MR. McDERMOTT: No offense taken, your Honor.

THE COURT: I will take this under advisement. Based on the inches of paper submitted—might be up to feet now—I can't promise you that there will be a prompt ruling, but there will be one reasonably soon.

Now, if you ask me to get more specific, I probably can't, but it will not be in a matter of days but hopefully it will be in a matter of a couple of weeks. Now, knowing that, let me ask Mr. McDermott and his colleagues, is there any reason we need to proceed to schedule and take testimony on the motion for preliminary injunction?

MR. McDERMOTT: Your Honor, I think that at this point, given the promptness in which you were able to schedule this hearing and your statements regarding the relevant quickness in getting to a conclusion of this matter, I think at this point preliminary injunction has been essentially mooted and I would be happy, with your permission, to withdraw it or you can consider it moot or whatever your preference is.

THE COURT: Oh, I don't think you need my permission to withdraw it. I don't even think a response has been filed to it, but —

MR. FEDER: Your Honor, we did file an objection— a response, but we'd have no objection to it being withdrawn.

THE COURT: Oh, well, then I'm afraid you can't withdraw it without their consent, which I have a feeling you could probably obtain easily.

MR. FEDER: No price.

THE COURT: Well, all right, then we'll treat—well, let's make sure the record's clear. You're moving at this time to withdraw the motion for preliminary objection?

MR. McDERMOTT: I am.

THE COURT: Excuse me—preliminary injunction?

MR. McDERMOTT: I am, your Honor.

THE COURT: And you're consenting?

MR. FEDER: No objection.

THE COURT: All right. Well, under whatever the rule is, I think it's—what is it, 41(A)(2) or something or other? I'll look it up and get the rule right. Whatever rule it is, under the rule we'll grant your motion.

Yes, sir?

MR. McDERMOTT: If I may, one other point, you had expressed an interest in conclusions of law?

THE COURT: Oh, no, no, not an interest. I'm positively requiring them. This is Wednesday, I believe—yeah, it is Wednesday. I would like to get your proposed conclusions of law as quickly as possible. I mean, if you really want to get this done expeditiously consistent with my other obligations and cases and so forth, I don't see why you couldn't get these in within 24 hours. I thought I would have them today.

I mean, if you could get all the stipulations of fact together in 24 hours, it ought to be easy to get your proposed conclusions of law together, you ought to already have them. You just need to, I assume, put them in the form of proposed conclusions. I mean, if you all don't know what principles of law you think are applicable at this point, then I don't know that you ever will. So why don't you try to get those in tomorrow?

MR. McDERMOTT: I think that's—that's fine. I am flying back to Chicago tonight, but I don't think that's a problem.

THE COURT: Oh, that's only going to take you about three hours and then you pick up an hour on the clock. You know, what the heck, you could—let's see, that would be about 8:30, 7:00, you could probably be in your office by 9:00 o'clock central time tonight.

MR. McDERMOTT: I'm sure Mr. Bedell would appreciate that.

THE COURT: Well, I'm sure he might. All right, I'm going to adjourn and I'll take the matter under advisement.

MR. FEDER: Thank you, your Honor.

MR. McDERMOTT: Thank you, your Honor.

(Court adjourned at 5:15 p.m.)

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